IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

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EDWARD J. HARDIN, as Mayor of Tazewell, Tennessee, and
JAMES B. DeBUSK, as Mayor of New Tazewell, Tennessee, - - - - - - - - Petitioners,

versus

KENTUCKY UTILITIES COMPANY, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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v.

KENTUCKY UTILITIES COMPANY, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue so that this Court may review the judgment entered on November 15, 1966 in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion in this case of the United States District Court for the Eastern District of Tennessee is reported at 237 F. Supp. 502 (E.D. Tenn. N.D. 1964) and may be found as Appendix A to this Petition.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at —— F. 2d —— (6th Cir. 1966) and may be found as Appendix B to this Petition.

Note:

App. A, B and C refer to Appendices printed herewith. Other Appendices are those in the record from the Circuit Court.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit is dated and was entered on the 15th day of November, 1966. There has been no rehearing. The jurisdiction of the Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. In communities where both TVA and an investor company were providing power on July 1, 1957, did Congress by enacting the TVA Financing Act[1] destroy the right of the people to choose the supplier?

2. Does the TVA Financing Act cut off the right of a city to compete with an investor company in supplying power to its residents where the company has no city franchise and both company and a TVA distributor were supplying power on July 1, 1957?

3. Did the TVA Board of Directors in administrating its affairs under the TVA Financing Act have a responsibility to make the findings here made and do they have the binding effect of law?

4. Where the TVA Board makes findings under the TVA Financing Act, which findings are supported by substantial evidence, may these findings be judicially overturned?

STATUTE INVOLVED.

16 U.S.C. Sec. 831n-4(a) appears herein as Appendix C.

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[1] Whenever "the TVA Financing Act" appears herein, unless otherwise specified, it shall refer to public law 86-137; 73 Stat. 280; Title 16 U.S.C., § 831n-4(a). The full text of the section involved is contained herein as Appendix C.

STATEMENT OF THE CASE.

This case arises out of a dispute between Kentucky Utilities Company (KU) on one side, the Towns of Tazewell and New Tazewell, Tennessee, Powell Valley Electric Cooperative (PVEC) and TVA on the other. The question is whether TVA power may legally be distributed by the municipally owned electric systems of the towns to their citizens.

Prior to the advent of TVA, Dixie Power and Light Company, predecessor to KU, provided electric service to some locations in Claiborne County wherein the towns are located in northeast Tennessee. KU held a non-exclusive county franchise which gave it the right to occupy county roads along with other utilities.[1] It has never held a franchise from the towns. At a later date PVEC obtained a similar non-exclusive county franchise.[2]

In 1954 Dixie Power and Light transferred its assets to KU and was dissolved.[3]

The problem of competition in the area over electric service was the result of substantial rate differentials between KU on the one hand and the city systems of Tazewell and New Tazewell and PVEC (all TVA power distributors) on the other.[4]

Also there was evidence that the growth of PVEC service was the result of some failure of KU and its predecessor to be aggressive in providing service.[5]

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[1]App. 5b.
[2]App. 72a, 73a.
[3]App. 66a.
[4]App. 93b and 94b.
[5]App. 79b, 80b and 88b.

Mayor DeBusk of New Tazewell stated:

> ". . . my parents and neighbors was trying to obtain electricity because we was . . . we didn't have no refrigerators, we didn't have no facilities, we even used a Delco plant, and so the Powell Valley was coming down in that area and my Dad had done give a deposit of $5.00 for the power and when KU got the word or heard that they were coming in that area they rushed right at once and took them up.
>
> . . . . . .
>
> "That shows that we wouldn't have grown if we hadn't had TVA power or Powell Valley power, and I think the records show that."[1]

The rate differential resulted in construction of a large majority of new homes incorporating the principle of electric heat where those homes were built on lines of the city systems or PVEC.[2]

A comparison of the rates made by the PVEC manager showed that a certain level of consumption would produce a bill of $38.00 to a customer on PVEC lines whereas the same consumer would be billed $95.53 on KU lines.[3]

Land values were greatly affected and such construction as was undertaken was largely confined to lots where TVA power was available. There, the interpretation KU placed on the territorial restriction provisions of the 1959 TVA Financing Act is particularly

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[1]App. 109b and 110b.
[2]App. 94b.
[3]App. 94b.

interesting as revealed in two interrogatories and answers.

KU was asked:

> "Q. 12. Do you contend that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by one of plaintiff's customers, is outside of the 'TVA area' as described in paragraph 10 of your complaint?
>
> A. Yes.
>
> Q. 13. If your answer to interrogatory 12 is in the affirmative, do you concede that the entire boundary of a tract of land within the municipalities of Tazewell and New Tazewell, Tennessee, only a portion of which is occupied by a customer of Powell Valley Electric Cooperative, is within the 'TVA service area' as defined in your complaint?
>
> A. No.'"[1]

The intense feeling of the people was indicated in a poll taken by the mayors which showed the people five to one or better in favor of receiving power from a TVA distributor rather than from KU.[2] The manager of Powell Valley tells his feeling that he is being forced to help the people, saying:

> "As manager of Powell Valley Electric Cooperative it would have been far easier for me to live with the territorial agreement with KU because I wouldn't have as many problems as I have probably if I lived with this agreement.

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[1] App. 212b.
[2] App. 108b.

Q. Did you feel that whichever way you went you were going to wind up in court?

A. Yes, sir.

Q. What lead you to feel that way?

A. Well, from time to time people had in a roundabout way threatened to sue us, and as I said a while ago, our attorney said we might not be in too good a position in this situation.

Q. To refuse service to the public?

A. To refuse to serve these people."[1]

In the midst of the turmoil there was a city election in which the main issue was power and in which the candidates supporting KU's position were defeated and the candidates favoring Powell Valley and the city systems were elected.[2]

Also in the struggle one tactic employed by KU was an effort to get cities to grant city franchises.[3] This it did by offering money to the cities. The representative of KU in delivering the checks was indefinite as to what the purpose of the checks was, but the checks had typed on them "in return for perpetual franchise."[4] Paris T. Coffey, President of the Tazewell Chamber of Commerce testified:

"Q. And then I asked him, I said, would you give these checks to us without any strings being attached to them, and he—I don't remember exactly his reply about it. I said, we feel this is for a franchise, and he said, no, this is a dividend or something to that effect that we owe it to you, and

[1]App. 89b.
[2]App. 73b.
[3]App. 23b, 24b, 80b, 81b.
[4]App. 14b.

I insisted, the fact about, Mr. Smith and I had kind of a strong argument over the check and I said, if we are due it, Mr. Smith, we are due it without strings. If we are not due it, I don't think you can come over here and buy Tazewell for thirty some hundred dollars. That's the way I feel about it. We may be poor, but still we are independent from that angle.

"And so, he left the checks, and, also I'll put it this way, Mr. Smith brought it down to a personal affair, he said, what about your funeral home out there, if somebody wanted to repair something about your funeral home. I said, Mr. Smith, if you will put your power down in competition with your competitor, as I have mine with my competitors, well, we will welcome KU power, and we do. We have nothing against KU, but we do want cheaper power."[1]

Claiborne County, Tennessee, is a seriously depressed area in grave need of economic help.[2] Its condition of need caused many communications to pass between the representatives of the people in Tazewell and New Tazewell, largely through their mayors, in an effort to get Ku either to lower the rate or to sell its facilities to the cities' system.[3] These efforts were unavailing. The last communication by letter from the mayors to KU went unanswered for a period of five weeks until finally the towns established, pursuant to the Tennessee law, municipal systems and commenced construction of their own distribution lines.[4]

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[1]App. 80b, 81b.
[2]App. 78b, *et seq.*, 117b.
[3]App. 106b, 118b, 119b.
[4]App. 119b.

The city system was established by resolution of the city councils in October of 1963. The city employed a contractor to construct facilities to the points of service where service had been demanded. In one case there was a physical cutover from KU service to the city service without action on KU's part and this was done by Cecil Hurst, a motel owner. Hurst testified that he put in an application with the city and called KU to tell them to disconnect. After several fruitless attempts to communicate with KU he found the service manager of KU on the road.

> "I thought I'd get out and take after him and tell him, and went up the road about a mile and he turned around and I stopped and talked to him, and as soon as I started talking to him, he run off, and left me, and I had to run him down again and I ran him down in New Tazewell, and I blowed my horn, and he pulled over and stopped, and I told him I would like to discontinue Kentucky Utilities and he said, 'I'm not going to do it. I can't change. I can't take it loose.' "[1]

Hurst then tells about his going with the city contractor and obtaining a meter which he, jointly with the contractor, put on his motel physically changing the service from KU to the city service.[2]

In other cases when KU was requested to terminate service it did so with its own crew, sometimes in a rather surprising manner. Jerry Brooks, owner of the Brooks Furniture Manufacturing Company of Tazewell, tells how he called KU and a KU man came out

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[1]App. 74b, 75b.
[2]App. 75b.

and cut power off in the middle of a working day when he had a full crew on without even giving him a chance to shut down his machinery and thus avoid a possibly dangerous situation. In response to a question of KU counsel as to whether the manner of the cutoff was not reasonable from KU's viewpoint, Brooks comments:

> "The pole which carries the Kentucky Utilities service is not more than 50 feet to the entrance of my office, and since we had been buying power from KU these many years, I think Mr. Pressnell or someone from the uitlity company, should have at least shown me the courtesy of coming into my office and telling me they were going to cut the service. If they had I would not have objected to it, but I certainly would have gone out into my plant and turned off the motors and taken steps to prevent any damage to the machinery. Fortunately no damage was done."[1]

Shortly after the establishment of service from the system owned by the cities of Tazewell and New Tazewell, KU commenced this action.

One final and important point is necessary to a proper statement of facts herein. This is to recognize that on July 1, 1957 TVA distributors had lines completely surrounding the towns. They were supplying power at many points on all sides of the towns and in the area which the Circuit Court called KU's "corridor."[2] This is graphically portrayed by Exhibit 91. which is the only map precisely showing all users of TVA power in the area on that date. This map is

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[1]App. 70b.
[2]App. 48b.

attached to and made a part of the dissent of Circuit Judge Edwards in this case.[1] On July 1, 1957 KU was supplying 561 customers in the towns to 28 receiving TVA power. But in the total area of Claiborne County TVA distributors supplied 3,564 customers to 1,839 for KU. The average Kwh sales for June and July of 1957 were 1,015,000 to the TVA consumers compared to 610,000 for KU.[2] The foregoing is essential to determination of who was the primary source of power supply in that area on July 1, 1957.

REASONS FOR GRANTING THE WRIT.

1. The Right of the Consumer to Choose His Electric Service in Areas Where Both KU and TVA Power Was Available on July 1, 1957 Was Not Destroyed by the TVA Financing Act.

One of the more regrettable errors of the majority opinion of the Circuit Court lies in the fact that the Court gives absolutely no attention to the right of the people in the area. The opinion of the Court treats this case as nothing more than a battle between KU on the one hand and TVA and PVEC on the other (the court calls PVEC "PVA").

There is absolutely nothing in the TVA Financing Act to indicate that the rights of the people in those areas where both TVA distributors and other sources of power supply were available, were to be impaired. Indeed, the history of the Act clearly demonstrates the contrary.

[1] App. B following page 86.
[2] App. 213b.

We believe one of the bases of the incorrect conclusion reached by the 6th Circuit was the fact that the majority of the Court misread the legislative history of the Act. The Court comments at some length on the Vinson Amendment which became a part of the bill as it passed the House, but was eliminated prior to final passage. The opinion states:

> "During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.
>
> "In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accommodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *cf Hearing, Senate Committee on Public Works,* 86th Cong., 1st Sess., S 931 and H.R. 3460 pp. 39-51. (1959), between the Georgia Power Co. and TVA, *Id,* at 220, and indeed in our own case between KU and PVA, Rep. Vinson stated that his amendment 'writes into the law the "gentlemen's agreement." *Hearings, 86th Cong.,* 1st Sess., House Committee on Public Works, H.R. 3460, p. 111 (1959).'" ___ F. 2d ___; Appendix B, pp. 68, 69.

The Court then talks about the Senate version of H.R. 3460 which removed the language of the Vinson Amendment and replaced it with substantially different language prior to final passage. However, the Court

incorrectly states the language of the Vinson Amendment "ultimately became a part of the Act" and reasons from that position. The opinion further says:

> "In the Senate report (No. 470, 86th Cong., 1st Sess., 1959 on the final version of H.R. 3460, the Senate noted:
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> "'Although there has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. *Others believed, however, that the stablization area should be defined and limited by law.*' U.S. Code Cong. and Adm. News, 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis supplied.)
>
> *"The 'others' were those who supported the Vinson Amendment which became a part of the bill."* (Emphasis supplied.) —— F. 2d ——; Appendix B, pp. 69, 70.

It is quite clear that Representative Vinson when he tacked on the Vinson Amendment was trying to help the Georgia Power Company in its efforts to restrict TVA. Representative Vinson stated his amendment would protect TVA consumers, but it was evident from his own statement that his real concern was for

> "the stockholders of the Georgia Power Company, the employees of the Georgia Power Company, as well as thousands upon thousands of individuals who have investments in private utility companies." H.R., 86th Cong., 1st Sess., on H.R. 3460 and H.R. 3461, Report No. 86-3 p. 110 (1959).

The language Representative Vinson inserted in the bill when it was before the House was as follows:

> "Unless otherwise specifically authorized by act of Congress existing and subsequently built, leased or acquired power facilities of the Corporation shall not be used for the sale or delivery of power for use outside the service area of the Corporation as it existed on July 1, 1957, except, when economically feasible for exchange-power arrangements with other utility systems which the Corporation had such arrangements on said date." *Id.* at p. 111.

The language of the Act as passed is:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* . . ." (Emphasis Added.) 16 U.S.C. § 831n-4.

Overlooking this basic difference between the Vinson Amendment and the law as passed, we submit, was a major cause of the error committed by the 6th Circuit.

However, and to reiterate, it is interesting that nowhere in the opinion of the 6th Circuit does the Court recognize the interest of the people involved except in its caption. This again is error in that the caption includes Mayors Hardin and DeBusk "individu-

ally" as defendants against whom the judgment runs, as well as in their capacities as mayors. Yet, the action against the mayors in their individual capacities was withdrawn during the trial before the District Court.[1] Other than the mistake made regarding the mayors as individual defendants the Court simply refused to recognize any interests of the people of the communities despite the undenied fact that many of them had been receiving TVA power since before July 1, 1957.

Since the Act itself does not make specific mention of the right of individual ratepayers or the public generally in those areas where both TVA distributor lines and other lines existed, we submit it is appropriate to examine the legislative history of the Act on this point.

In the Senate Report where the bill obtained its final shaping it is stated:

> "In summation, the committee believes that H. R. 3460, as amended is satisfactory and equitable insofar as the territorial restrictions is concerned. It will permit desirable minor adjustments on the periphery of the area presently supplied and within that area; prevent service to additional cities with a population in excess of 5,000 or 10,000 if they own their distribution systems; *protect the right of certain communities to choose their power supply;* protect the areas now being served by private, utilities; preserve existing contracts, interchange arrangements, and power supply to defense installations; and reduce the possibility of litigation and confusion arising from ambiguous terms. It further believes that

[1] App. 30a; Appendix A, p. 35.

> the TVA Board would use extreme caution in extension of service as authorized and would not encroach on other communities now served by private enterprise." (Emphasis Added.) *Revenue Bond Financing by TVA*. Senate Report No. 470 July 2, 1959 p. 9.

Senator John Sherman Cooper incorporated a statement in the Congressional Record which emphasized the point as follows:

> "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." 105 Cong. Rec. 13052.

Judge Taylor of the Federal District Court, Eastern District of Tennessee, recognized this in his opinion and states that the Senator "apparently had no question about its authority under the Amendment to serve municipalities inside the periphery." 237 F. Supp. 502 at 511; Appendix A, p. 52.

Another point of serious error in the opinion of the 6th Circuit is where the Court comments:

> "TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and therefore, it is no business of KU where these municipal systems obtain

> their power. But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit." ___ F. 2d at ___; Appendix B, pp. 79-80.

What the Court is in essence saying is that the towns have a right to compete but at the same time the judgment of the Court destroys any possibility of competition. Similarly, at another point in the Opinion the Court says:

> "KU does not have an exclusive franchise, and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area." ___ F. 2d at ___; Appendix B, p. 80.

In other words, anybody has a right to compete with KU—anybody, that is, except those who have any possible chance of competing. There are only two suppliers of power for resale in the area. The Court says one may no longer supply power. Does this not in effect give the other a perpetual and exclusive franchise? We think it obviously does.

As shown in the statement of facts, herein, the towns withstood considerable bludgeoning on the part of KU in its efforts to obtain franchise rights within the cities. But, as has been stated, what the Court does is say to KU, since the towns have refused you an exclusive franchise, we are going to write one out and hand it to you.

The Court's Opinion further says:

> "From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, in July 1, 1957, a part of and within the total areas served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts 'for the sale or delivery of power.'" ____ F. 2d ____; Appendix B, p. 7.

The far reaching effect this language, which we think was totally beyond any contemplation of Congress in the TVA Financing Act, is that it says that TVA and its distributors, both the city municipal utility systems and PVEC, have to get out of the towns. There was absolutely no discussion in the Act or in any of the committee hearings to the effect that TVA power distributors would have to give up customers they then had. Yet this is precisely what the Circuit Court says must be done.

2. The TVA Financing Act Did Not Impair the Right of the Cities of Tazewell and New Tazewell to Compete With KU and, in so Doing, Distribute TVA Power in an Area Where It Was Being Distributed on July 1, 1957.

As has been mentioned, the Circuit Court purports to emphasize that KU is not seeking protection from "all competition." And yet the judgment of the Court terminates one of only two sources which have offered power supply to the area for a period of many years. These two sources are also, as a practical matter, the only two possible sources of wholesale power supply available for distribution in the area. The Court thus holds that the TVA Financing Act gives KU an exclusive monopoly franchise which it has been unable to obtain from the people. The Tennessee statutes specifically give the towns the right to acquire their own electric systems and to supply power to their citizens in competition with KU. Tenn. Code Ann. §§ 6-1501 to -1537 (1955) (Municipal Electric Plant Law of 1935); Tenn. Code Ann. §§ 6-1301 to -1318 (1955) (Revenue Bond Law). This authority has been sustained in the courts in the cases of *Keeble* v. *Loudon Utilities,* 370 S. W. 2d 531 (Tenn. 1963); *Knoxville Water Co.* v. *Knoxville,* 200 U. S. 22 (1906); *West Tennessee Power & Light* v. *City of Jackson,* 97 F. 2d 979 (6th Cir. 1938).

The effect of the Court's decision is to kill the cities' systems as distributors and to hold that the TVA Financing Act overrides the acts of the Tennessee legislature and withdraws the rights which the Tennessee law purports to afford. This is certainly a broad de-

parture from the development of law up to this point, for the right to TVA to afford competition to the investor companies has hitherto been well established in cases cited in the Opinion of the 6th Circuit, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464 (1938); *Tennessee Electric Power Company* v. *TVA*, 306 U. S. 118 (1939); and *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (CA D.C. 1955), cert. den. 350 U. S. 884 (1955).

Of course it might have been possible for Congress constitutionally to withdraw the right of competition, or of some competition by TVA and the towns as its distributors, or to circumscribe that competition. We believe the 1959 TVA Act does this in the area beyond the fringe area. But again, we come back to the language of the Act itself and to the statements made about the effect of that language in Congress at the time the Act was passed. The language of the Act to which we refer is, of course, the following:

> "Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within such area.
>
> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying

> electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act." 16 U.S.C. 831n-4(a)

The obvious purpose of this Act is to let TVA have some reasonable expansion beyond the area where it was serving July 1, 1957. Yet the effect of the judgment of the 6th Circuit will kill the cities' systems if they can serve no customers not being served on July 1, 1957. The fact that this was not the intent of Congress is shown by many of the committee comments on the bill when passed. In the final Committee Hearings, the report submitted by Senator Robert Kerr, Committee on Public Works, states:

> "The committee believed it desirable to authorize minor adjustments in area, to permit elasticity and adjustment in an attempt to eliminate certain problems, and to obviate the necessity of coming back to Congress for each slight adjustment or change, as by extension of lines by a distributor of TVA power.
>
> . . . . . .
>
> "The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems

in the marketing of the bonds by TVA." *Revenue Bond Financing by TVA,* Senate Report No. 470, July 2, 1959, pp. 8, 9.

Individual views of the opponents of the final language of the bill, Senators Winston L. Prouty and Jennings Randolph, are contained in this same report.

Senator Prouty stated his apprehensions about the language as follows:

> "It is the committee's intent, insofar as the territorial restrictions in the bill are concerned, to permit desirable minor adjustments on the periphery of the area presently supplied by TVA power to take care of natural growth within that area.
>
> "However, I believe that in its efforts to protect the rights of present customers of TVA the committee has approved language which would permit a city or any other present customer of TVA to resell TVA power to innumerable communities, whatever their size, and throughout other areas, however large.
>
> "In my judgment, the language in the bill as presently written permits the Tennessee Valley Authority to make contracts for the sale of power with States, counties, municipalities, corporations, partnerships, and individuals with which it had contracts on July 1, 1957, and these contracts would not be subject to a territorial limitation of any kind." *Id.* at 52.

Senator Randolph also voiced fears about the language but went on to say:

> "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." *Id.* at 54.

Thus we see two opponents of TVA interpreting the language of the Act entirely differently from the way it was interpreted by the Court of Appeals. This we should qualify to the extent that the Court of Appeals says KU service in the area does not constitute an island but is a peninsula. The question as to whether it was an island or a peninsula is best shown by the map, Exhibit 91, filed with Judge Edwards' dissent which specifically locates every point of service of TVA power in Claiborne County, Tennessee as of July 1, 1957.

The points of service in and around the towns as Exhibit 91 clearly shows are so numerous as to make it impossible to locate any corridor. Here also it is to be remembered not only does PVEC have a transmission line crossing the KU transmission line coming into Tazewell and New Tazewell but it also owns the substation from which all of KU's customers, all the customers of PVEC, and all customers of the city systems in the general area receive power.[1] The fact that KU owns a transmission line should be equated by PVEC's owning the substation from which all service is rendered in the area.

But the main point of importance, we think, is the fact of the myriad of service outlets of TVA power which existed as of July 1, 1957. The map also filed

[1]App. 185b.

with the dissenting opinion in the Circuit Court which purports to show a corridor of KU service does not show any specific points of service of KU and/or TVA distributors.[1] Moreover, it was prepared in 1952, five years prior to the date picked by Congress as the cutoff date to determine the general boundaries of TVA's primary service area. We submit the Court should judicially note the fact that the five years from 1952 to 1957 were years of enormous growth in the electric industry generally and in the Tennessee Valley, particularly. Therefore the map KU offered to show it served a corridor lacks relevance in that it is not tied to the magic date of the TVA Financing Act itself.

3. The TVA Board Does Have Responsibility in Administering Its Affairs Under the TVA Act to Make Findings and the Findings Here Made Have the Binding Effect of Law.

The Opinion of the Circuit Court leaves in serious question whether the Board of Directors of TVA has any appreciable responsibility to make findings or interpretations of the TVA Act to assist it in the administration of its affairs. The Court says:

> ". . . TVA argues, the 1959 Act must be read as committing to its board of directors authority to determine 'the area' in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's board such authority." ___ F. 2d at ___, Appendix B, p. 70.

[1]Appendix B, following page 86.

It was stated many times by the Committee that the final language of the Act was left to some degree imprecise respecting the area within which TVA's power might be distributed. This was deliberate, as the Committee said, because it believed it "desirable to authorize minor adjustments." This being so it is extremely difficult to rationalize, as the majority of the 6th Circuit does, to the point of the above quoted language.

The authority of the TVA Board to make by-laws, regulations, findings and determinations in the administration of its affairs under the Act has always been sustained. One of the early cases on the point was *Morgan* v. *Tennessee Valley Authority,* 115 F. 2d 990 (6th Cir. 1940) cert. dend. 312 U. S. 701 (1941). This case was a determination of the power of the President to remove a director from the TVA board, the President having dismissed Arthur E. Morgan. Morgan contended that the President had no such right to remove a member of the board during the term for which he was appointed. The Court explained the position of the TVA Board as follows:

> "Many of these activities, prior to the setting up of the T.V.A. have rested with the several divisions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in nowise, different, except perhaps in degree, from the duties of any other administrative officers

> or agencies or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The board does not sit in judgment upon private controversies, between private citizens and the government, and there is no judicial review of its decisions except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department." 115 F. 2d at 994.

This has essentially described the position of the TVA Board for more than a quarter of a century. But one other very important point here to be considered is the fact that TVA does have a responsibility under the Act to make annual reports to Congress.[1] After these reports are made it is appropriate for Congress in maintaining its surveillance over the entire operation to question any administrative decisions it thinks proper. It is noteworthy that in August of 1966 the 89th Congress substantially amended the TVA Act. This amending act extends the borrowing authority of TVA from $750,000,000 to $1,750,000,000.[2] Neither in the reports made by TVA to the Congress nor in Congress's 1966 amendment of the TVA Act has any

[1] "The board shall file with the President and with the Congress, in December of each year, a financial statement and a complete report as to the business of the corporation covering the preceding governmental fiscal year." 16 U.S.C. § 831h(a).

[2] P.L. 89-537; 80 Stat. 346 (1966).

question been raised about the administrative determination herein held invalid by the 6th Circuit. Had Congress felt TVA had committed substantial violation of the 1959 amendment, surely it would have raised questions.

In the case of *TVA* v. *Kinzer,* 142 F. 2d 833 (6th Cir. 1944), the Court ruled upon a determination made by TVA's Board relative to the establishment of a retirement system for its employees. The Court said:

> ". . . the issues are: whether § 3 required regulations; whether the rules and regulations here in question are reasonably adapted to the administration of the act; and whether such regulations have received the legislative ratification that gives them the effect of law. If these propositions are answered affirmatively, the appellant must prevail." 142 F. 2d at 835.

The Court in the *Kinzer* case held that affirmative answers must be given to the questions and it said that continuing appropriations by Congress manifested congressional approval of administrative determinations made up to the time of the appropriation. The holding in the *Kinzer* case, we submit, is most important for the light it throws on the instant case. The Court there said:

> "The voting of such appropriations, in the face of the construction placed upon the Act by the Authority, has an effect similar to that resulting from the reenactment of a statute, the provision of which had, theretofore, been interpreted by regulations; they are deemed to have received Legislative

> ratification and thereby, to have become embedded in the law; and are to be given the same force and effect as the statute itself." 142 F. 2d 837.

Here in our case, applying the rule of the *Kinzer* case, we can say that TVA made five separate annual reports to the Congress since the administrative determination was made by the TVA Board on February 4, 1960 and prior to the adjudication of this case in the Court of Appeals. Also in this period of time Congress has amended the TVA Act to authorize TVA to raise a billion additional dollars. Clearly these factors establish Congress' tacit approval of the Board's administrative action in the meantime and thus that action by way of its interpretation on territory has become "embedded in the law" and is to be given the same force and effect as the statute itself.

The TVA Act gives the Board power to "adopt, amend and repeal by-laws" and to exercise "such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation." 16 U.S.C. § 831(c). The Senate Committee clearly recognized this power and in putting together the final language of the 1959 amendment to the Act, that Committee commented:

> "The committee believes that the TVA Board would not be reckless in utilizing the authority to provide additional service, which actually amounts to less than 1 mile around the periphery of the predent area in which TVA power is used, and would properly use such authority to supply isolated communities and contiguous areas, exten-

sion into rural areas and expanded municipal areas, and minor necessary adjustments around the periphery and within the area in which power is now supplied.

"H.E. 3460, with the amendments proposed by the committee, does not change the basic administrative premise of the TVA Act. The TVA Board will continue to be held fully responsible by the Congress for the results of its operations, and it will have corresponding administrative authority in the discharge of this responsibility. The actions of the Board will be subject to annual review by the Congress." *Revenue Bond Financing by TVA*, Senate Report No. 470, July 2, 1959, p. 7.

Summarizing, then, we invite the attention of the Court to the fact that the TVA Financing Act does not change the pre-existing power of the TVA Board to make determinations in administering its affairs. We also ask the Court to note that the Senate committee in approving the 1959 amendment recognized these administrative powers and specifically states its understanding that the Board would make such findings. This, we submit, compels the conclusion that the Board acted properly. It implies the correctness of the District Court's holding in this case and the view of the dissenting Circuit Judge sustaining that action.

4. The Resolution of the TVA Board Defining Its Service Area Being Supported by Substantial Evidence Should Be Sustained.

The Court of Appeals in its opinion is unable to state definitely whether the judgment of the District Court was an independent finding of fact or amounted to an order sustaining the resolution of the TVA Board. The Circuit Court says:

> "The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's resolution amounts to a finding of fact, we consider that it was clearly erroneous." ——F. 2d at ——, Appendix B, pp. 70, 71.

It also states:

> "We do not consider that the District Judge's recitation that:
>
> > " 'KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.'
>
> was a finding of fact that the Tazewells were 'islands.' " *Id.* at ——, Appendix B, p. 73.

If the Circuit Court is correct in its inference that the handling of the case by the District Court amounted to an affirmation of the finding by the TVA Board, then that finding is entitled to stronger presumption of support than if it were merely a finding of fact by the District Judge. FRCP 52(a) says in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Under this rule perhaps the leading case is the case of *United States* v. *United States Gypsum Company*, 333 U. S. 364 (1948). Mr. Justice Reed, speaking for the Court in this case gives the reason for the rule and extent of its applicability as follows:

> "That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies* or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate

> court. The findings were never conclusive however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.) 333 U. S. at 394, 395.

In the italicized portion of the above quote the Court by footnote cites the case of *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 (1945). In the *Corn Products* case the Court sustains a finding of the Federal Trade Commission, saying:

> "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." 324 U. S. at 739.

It is natural for the courts to give special attention to findings of fact by administrative agencies operating under special statutes. Such agencies accumulate expertise in specific fields which goes beyond the more general experience of the courts.

Thus we submit that if the 6th Circuit can by a simple statement, in the face of undenied facts and documents, overturn a District Court which in turn sustained the finding of an administrative body, this then virtually destroys any rule or presumption of correctness of the original finding. It leaves the question as wide open to redetermination as if no administrative determination at all had been made in the first instance.

We strongly urge upon the Court that it would be impossible to administer TVA without the Board

making certain findings which in some instances require an initial interpretation of the TVA Act. We further submit that where those findings are based upon substantial evidence they must be sustained by the District Court as the District Judge here stated in his opinion. Finally since the 6th Circuit felt the discussion eminated originally and was bottomed upon the administrative determination, that determination is entitled to greater consideration and presumption of correctness than had it been a completely independent finding *de novo* by the District Court.

CONCLUSION.

Rule 19 of the Supreme Court gives indication of the character of reasons governing review by certiorari. In part that rule states that one important reason for review on a writ of certiorari is where the Circuit Court "has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings; or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." We submit that except for the reason of sanctioning "departure by a lower court," all of the foregoing reasons have direct and important application in the case at bar. The 1959 amendments to the TVA Act were an important addition of the federal law affecting one of the largest

agencies of the federal government. This Act has never before been judicially construed until this case. This alone we urge is sufficient reason for the Supreme Court to grant certiorari.

Moreover, the decision of the Circuit Court in this case is at great odds with previous decisions of the Supreme Court relative to the powers of the Tennessee Valley Authority.

Finally we think the Circuit Court's casual treatment of the rights of the people involved in the area, its unwillingness to consider the interest of the towns and its determination to treat this case as a simple fight between an investor company and TVA, constitute departure from the accepted and usual course of judicial proceedings. Another departure from the usual course of such proceedings is its complete readiness to upset an administrative determination based upon substantial evidence, affirmed by a District Court by the simple use of the words "clearly erroneous."

We, therefore, urge that writ of certiorari issue to the Court of Appeals in this matter.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on this 9th day of January, 1967, I served the foregoing Petition for Writ of Certiorari upon the parties by mailing a copy of the same to:

Solicitor General
Department of Justice
Washington 25, D. C.

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APPENDIX

APPENDIX

APPENDIX A

MEMORANDUM

(Filed October 15, 1964)

Plaintiff, Kentucky Utilities Company, hereafter referred to as KU, seeks injunctive relief against defendants, Tenneseee Valley Authority, hereafter referred to as TVA, Powell Valley Electric Cooperative, hereafter referred to as Powell Valley, Edward J. Hardin, Individually and as Mayor of Tazewell, Tennessee, and James B. DeBusk, Individually and as Mayor of New Tazewell, Tennessee, to prevent them from taking or attempting to take its electric customers in the area of Tazewell and New Tazewell, Claiborne County, Tennessee, and also a judgment for damages for loss of business resulting from defendants' alleged wrongful acts.

Jurisdiction is based on 28 U.S.C. Sections 1331, 1332, 2201 and 2202.

The action against Mayors Hardin and DeBusk in their individual capacity was withdrawn during the trial.

KU seeks to enjoin TVA from selling or delivering electric power to Powell Valley, a distributor of TVA power, and enjoin Powell Valley from purchasing or receiving from TVA electric power for resale in either of the municipalities of Tazewell, Tennessee or New Tazewell, Tennessee, other than to customers and locations receiving electric service from Powell Valley on October 30, 1963. Relief is also sought against the Mayors of the two towns in their official capacities to prevent them from interfering with KU customer contracts.

Plaintiff contends that commencing in 1961 or 1962 and continuing to the present time, all of the defendants have combined and conspired and acted together to appropriate

to themselves all of the electric utility customers, business, revenues and contracts of KU for electric service within the two Tazewells, and that several dozen customers have been lost by KU as a result of the conspiracy.

The claimed overt acts consist of numerous meetings held by the representatives of defendants whereby plans were devised and carried out through acts commencing October 30, 1963 to take all of the business of KU in the two municipalities.

Plaintiff further contends that the TVA in furnishing electric power and in agreeing to furnish electric power to Powell Valley, which sells to the two municipalities and which has agreed to sell at retail to customers located in the corporate limits of the municipalities, violated 16 U.S.C. Section 831n-4 (hereafter called the 1959 TVA Act), which provides in pertinent part as follows:

> ". . . Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a

municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act."

The Act became effective August 6, 1959. It is to be noted that thereunder the TVA, except for specified exceptions, was not to contract for the supply of power "outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957."

KU insists that TVA was not the primary source of power supply in the areas of the two municipalities on July 1, 1957, within the meaning of the Act but that the municipalities were receiving electric service from KU on that date and on the date the Act became effective.

KU further contends that there was a common law conspiracy of the defendants to interfere with the contractual relations between it and its customers in the two municipalities by inducing such customers to terminate their contracts with KU in violation of the 1959 TVA Act.

TVA contends that plaintiff has no standing to maintain the action as the complaint presents no justiciable controversy: That KU does not have an exclusive franchise to furnish electric service in the municipalities and has no common law or statutory right to be free from competition of TVA and its distributors. That the 1959 TVA Act does not expressly confer upon KU the right to maintain an

action based upon alleged violations of the Act by TVA and, in the absence of such provision KU is without standing to bring the action.

TVA contends further that the findings of its Board that the two municipalities are within the TVA service area is not subject to judicial review if the finding was made in good faith and supported by substantial evidence and that the Board's action met these requirements.

TVA also contends that it has made no contract since the effective date of the Act which would have the effect of changing the relationship of TVA or its distributors with respect to the source of power supply in the two municipalities.

TVA says that it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957 within the meaning of the 1959 TVA Act.

TVA denies that it unlawfully induced or combined to induce customers of KU to terminate, breach or sever alleged contracts with KU for electric service.

TVA asserts that the citizens of Tazewell and New Tazewell, Tennessee have a right to obtain electric service from whomever they please and that KU has no right to be free from lawful competition.

The two Mayors, and the municipalities which they represent, adopted the contentions made by TVA and in addition they point out that KU is serving customers in the area of the municipalities at the sufferance of the municipalities as KU has neither an exclusive franchise nor any franchise to serve the municipalities. They assert that the municipalities have the right under the Tennessee law to establish their own electric systems and that the citizens acting through ther elected officers have the right to choose between the TVA current and the current furnished by private institutions.

The defenses of Powell Valley to the complaint are the same as the other defendants insofar as applicable.

Standing of Plaintiff to Maintain Action

If plaintiff has proved the charges of common law conspiracy and a violation of the 1959 TVA Act and has sustained injuries therefrom, it has standing to maintain the suit. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537, cert. denied, 358 U. S. 830 (C. A. 6); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.* (D.C. Cir), 323 F. 2d 290, cert. granted, 376 U. S. 948; *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, affirmed 278 F. 2d 871 (D.D.C.).

The cases cited by TVA of *Alabama Power Company* v. *Ickes*, 302 U. S. 464, *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U. S. 118 and *Kansas City Power & Light Company* v. *McKay*, 225 F. 2d 924, are distinguishable from the case under consideration. Each of these cases involved a suit by a private utility to enjoin officers or agencies of the United States from making contracts which would have the effect of increasing competition between the private retailer and the public power agencies. The public power agencies' competition was legal in itself, but was attacked on the basis that either the statutes authorizing the activities of the various officers and agencies were unconstitutional or that the officers and agencies had exceeded their authority under the Act. In each case, it was held that the competition complained of was in itself not prohibited by statute or the terms of an exclusive franchise; hence, no common law or statutory rights of the plaintiffs had been invaded. The plaintiffs, therefore, had no standing to question the authority of the various officers and agencies of the United States.

In *Alabama Power Company* v. *Ickes, supra*, the Court likened the position of the plaintiffs to that of a taxpayer suing to enjoin the expenditures of federal funds, which could not be done under the decision of *Massachusetts* v. *Mellon*, 262 U. S. 447. The distinction in these cases is that

the competition was shown to be legal while in the case under consideration it is claimed that the competition is illegal by reason of the unlawful conspiracy and the alleged violation of the 1959 TVA Act. See: *Texas & P. R. Co.* v. *Rigsby,* 241 U. S. 33, 39-40; *Wheeldin* v. *Wheeler,* 373 U. S. 647; *Hooper* v. *Mountain States Securities Corporation,* 282 F. 2d 195, cert. denied, 365 U. S. 814; and *Dann* v. *Studebaker-Packard Corporation* (C. A. 6), 288 F. 2d 201.

Findings of TVA Board Subject to Judicial Review

The TVA Board on August 26, 1964, some three weeks before the trial, found and determined that all of Claiborne County, Tennessee (within which County the two municipalities are located) is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

The TVA was first contacted by the Claiborne County Chamber of Commerce in 1961 for power. One or more members of the TVA legal staff was present at this meeting. The representatives were advised by TVA that there was a legal question as to whether TVA power could be supplied in the municipalities under the 1959 TVA Act and that a court decision would be helpful in resolving the question. Mr. Wessenauer testified in a discovery deposition that the TVA lawyers had advised him that under the Act TVA power could be supplied in Tazewell and New Tazewell and that so far as he was concerned that was the end of it. He also testified that the TVA left it up to the distributors to determine that they were staying within the boundaries set by the 1959 Act and that he thought this was a factor that should be taken into consideration by the TVA Board in determining the TVA area. He stated that if he were fixing the lines he would wipe out the pockets inside the TVA service area. That

he had not been advised as to the provisions of the Act with respect to "islands."

The factual presentation of Mr. Wessenauer, supplemented by the opinion of Mr. McCarthy, Chief Counsel, and its independent study, caused the Board to conclude that the two towns were within the TVA service area on July 1, 1957.

The issue before the Board was one of fact and law. Proper interpretation of the 1959 Act was the law issue, and the determination of the area supplied by TVA and the area supplied by other sources was the issue of fact.

It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard*, 321 U. S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra; Civil Aeronautics Board* v. *Delta Air Lines*, 367 U. S. 316.

The case of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, cited by the defendants involved the Walsh-Healy Act which expressly provided for hearings to be held by the Secretary of Labor at which evidence would be introduced and on the basis of that evidence a wage determination would be made. The question of the size of "localities" was necessarily one of the subjects upon which the Secretary was required to act in each case and make a determination. The decision by the Secretary was a decision of Congress made by delegated authority.

Another case cited, *Re U. S. ex rel. TVA* v. *Welch*, 327 U. S. 546, 554, is distinguishable from the present case in that the discretionary power to determine what lands should be condemned is expressly provided by the TVA Act. Title 16 U.S.C. 831x.

United States v. *Carmack*, 329 U. S. 230, 242-243, involved the selection of sites to be condemned for post offices. The Court noted that within its legislative power, Congress had the right to choose or reject the proposed post office site by direct action.

Conspiracy Charge

In support of its charge of conspiracy, KU contends that when the question of TVA power for the two municipalities was considered in 1961, TVA doubted that its power could be distributed in the municipalities without violating the 1959 Act and that a court decision should be obtained to clarify the issue. It was made clear by representatives of TVA and Powell Valley at this meeting that Tazewell and New Tazewell could not feasibly establish an electric system of their own but would have to depend on Powell Valley.

After the initial consideration of this question, KU contends that TVA officials cooperated in a move by the Chamber of Commerce and the two municipalities to buy TVA power for Tazewell and New Tazewell without getting a court construction of the Act. From that point on, various problems, in addition to the territorial limitations contained in the 1959 Act, were encountered.

KU asserts that it was known that KU would not voluntarily sell its facilities in the area of the municipalities and that the defendants planned to use various forms of threats and duress upon KU to force the sale of its facilities. That it was planned to use the Tennessee Public Service Commission as a lever to force the reduction of KU's rates in the area and to use threats to duplicate the KU system by a parallel system.

It further contended that Powell Valley was known to be the only feasible agency to supply TVA power in the two Tazewells from an economic standpoint but was blocked from doing this for several reasons: First, there was an agreement between Powell Valley and KU as to the boundaries to be served by these utilities. The 1959 Act encouraged such agreements. After several meetings of the defendants in 1961 and 1962, Powell Valley gave notice of termination of the 1958 agreement between it and KU to be

effective in 1963. The 1952 agreement between KU and Powell Valley which prevented the taking of each other's customers could not be terminated according to its terms without terminating the whole tri-party agreement under which KU supplied power into the Tazewell and New Tazewell area for its own customers and also for use by Powell Valley. This was an advantageous arrangement to Powell Valley and termination was not desired.

KU asserted that REA had a policy against duplicating facilities and the use of funds of the cooperative borrower for the construction of duplicating facilities.

That Powell Valley feared that if KU was pushed out of the Tazewell and New Tazewell area, KU itself might terminate the 1952 tri-party agreement under which KU supplied power to TVA for use by Powell Valley. If this should happen, Powell Valley customers in the area would be left without a source of TVA power. TVA put to rest this fear when the TVA Board promised that some source of power would be supplied if the parties moved along with the plan and supplanted KU in the area.

That because of many problems, a decision was made by defendants to use a so-called municipal system initially to displace KU in Tazewell and New Tazewell and the surrounding area. It was recognized that a municipal system was not feasible but that it might be utilitized as an initial arrangement to displace KU, after which Powell Valley would take over. Powell Valley service lines were to be used in getting its service to this small initial municipal system. While the two cities were carrying on the so-called municipal system, Powell Valley would actually do the operating, meter reading, and servicing.

It was KU's contention that TVA and Powell Valley suggested that the Mayors of the two cities present resolutions under which the Board of Aldermen of the cities simply turned the whole matter of establishing and operat-

ing this system or systems over to the Mayors to handle as the course of expediency dictated.

That in October, 1963, Powell Valley's contractor and engineer, acting under ostensible contracts with the Mayors, moved in and started disconnecting KU's customers who were induced by the foregoing arrangement to switch, and connected them to Powell Valley's lines. The municipal system that was thus constructed consisted largely of drop service lines to individual customers, which lines were connected to the nearest lines of Powell Valley. In several instances, one or more poles and a transformer were required to connect the customers to Powell Valley lines. After twenty-four customers of KU were appropriated, this action was instituted and the further taking of customers ceased. The contractor discontinued his work for the municipalities.

In the Court's opinion the evidence fails to show a conspiracy upon the part of any of the defendants. The evidence shows that the retail rates for electricity to residential and commerical customers in effect for KU prior to the institution of this suit were substantially higher than those for the TVA power distributors, and under applicable rate schedules the disparity increased with increased use. As a consequence, some of the witnesses testified that within the two towns the value of properties served by TVA electricity was substantially and uniformly higher than similar properties served by KU. The rate disparity created discontentment among some of the residential and industrial consumers and a number of citizens of the two towns appealed to their civic leaders and to their elected officials to explore the possibility of lower cost electricity. Numerous meetings were held among representatives of the municipalities, Powell Valley, TVA and various civic groups to see what could be done towards getting TVA power beginning in 1960. At these meetings, TVA representatives advised that TVA could not enter into a power

contract with either of the municipalities because they were so small that it would not be economically feasible for them to build and maintain their own separate distribution system and undertake the responsibilities of a TVA distributor. The representatives of the towns were advised to discuss their problems with Powell Valley to see if suitable arrangements could be made to obtain their electricity from Powell Valley.

Powell Valley advised the municipalities that it would be unable to obtain REA financing for construction of duplicating distribution lines within the towns and, therefore, the towns would have to buy or build their own systems.

At a meeting with the TVA Board of Directors, the Board advised representatives of Middlesboro, Kentucky and Tazewell, Tennessee, that both Tazewell and New Tazewell were within the area for which TVA was the primary source of power supply on July 1, 1957. This advice was confirmed at a meeting on November 27, 1962, at which time TVA gave representatives of the towns and Powell Valley assurance that the two towns were within the area for which TVA was the primary source of power supply on July 1, 1957 and that TVA would continue to supply Powell Valley with the power necessary to meet its loads in the Tazewell and New Tazewell area.

The municipalities then sought technical assistance and advice from the Legal Consultant on Municipal Law at the University of Tennessee as to how they might go about financing their own municipal electric systems. They employed an attorney who specialized in this field to advise and consult with them. After considering the advice and suggestions given them, to two towns, through their authorized officials, circulated a petition to the citizens of the towns to determine their desires in this matter. These petitions showed a strong sentiment for the acquisition by the

towns of their own municipal electric systems. Following the circulation of these petitions, the two councils passed resolutions on October 21, 1963, authorizing the Mayors of the two towns to take the necessary steps to purchase or build their own municipal systems and to finance the same from revenues to be derived from the systems. They expressed to KU their desire to purchase KU's distribution system in the two towns, but KU did not respond and they decided to build their own systems. They engaged a contractor to build the necessary facilities and to make the connections to the new customers. Thereafter, the two towns arranged with Powell Valley to maintain and operate the systems, do any additional construction work, make electrical connections, and handle the billing of the customers in the name of the two towns. Powell Valley was to sell electricity to the two towns at wholesale rates plus a small charge for transmitting the electricity, and it was also agreed that the rates charged the city customers would be no higher than those charged by Powell Valley to its customers under its contract with TVA.

Beginning in October, 1963, a number of residents of the two towns who were then receiving service from KU made application to the towns for electric service and notified KU to discontinue service to them and to disconnect their meters. On October 31, 1963, until the filing of this suit on November 7, 1963, eighteen former customers of KU had terminated their service with KU and became customers of the two towns.

The towns of Tazewell and New Tazewell have a legal right to own and maintain their own municipal electric systems and have a right to compete with KU for the customers in those towns and the offering to serve those customers at lower rates than those charged by KU did not constitute an unlawful interference with the customer contracts of KU in the absence of fraud. The evidence fails to show any fraud upon the part of any of the defendants.

86 C.J.S. *Torts*, § 44c (1954); Annot., 84 A.L.R. 63 (1933); Annot., 26 A.L.R. 2d 1259 (1952); *Fairbanks, Morse & Co.* v. *Texas Electric Service Co.*, 63 F. 2d 702 (C. A. 5, 1933); *Citizens' Light, H. & P. Co.* v. *Montgomery Light & W. P. Co.*, 171 Fed. 553 (M.D. Ala. 1909); *Wolf* v. *Perry*, 339 P. 2d 679 (N.M. 1959); *Emery* v. *A. & B. Commercial Finishing Co.*, 315 P. 2d 950 (Okla. 1957); *Augustine* v. *Trucco*, 268 P. 2d 780 (Cal. App. 1954).

The consumers in Tazewell and New Tazewell who have discontinued their service with KU had a legal right to discontinue such service and to take service from the municipalities. *Cass County Electric Coop.* v. *Otter Tail Power Co.*, 93 N. W. 2d 47 (N.D. 1958); *Blue Ridge Elec. Membership Corp.* v. *Duke Power Co.*, 128 S. E. 2d 405 (N.C. 1962).

Was TVA the Primary Source of Electric Power in Tazewell and New Tazewell on July 1, 1957?

KU contends that the area for which TVA or its distributors were the primary source of power supply on July 1, 1957 is the actual geographical area where the distribution facilities and customers of TVA and its distributors were located on that date; that if other utilities were the actual source of power, such areas were excluded from the TVA areas although they may have been wholly or partially surrounded by areas for which TVA or its distributors were the actual source.

KU argues that if a perimeter is to be drawn defining primary service area, the location of such perimeter can be properly fixed only by such facts as the facilities, customers and the rendering of service. Where adjacent service areas of private utilities form peninsulas or corridors or other indentations into the service area of TVA, such perimeter must follow these factual service areas and thereby exclude such peninsulas or corridors from the primary service area of TVA.

KU insists that all of the maps filed in evidence show that TVA or its distributors were not the primary source of power in these municipalities on July 1, 1957, and that a dozen TVA maps in evidence draw the continuous perimeter of TVA's primary service area so as to dip down into Claiborne County south of Tazewell and exclude, from TVA's area, KU's service area extending down from KU's adjoining service area in Kentucky. Thus, it argues, TVA's primary service area does not include, and cannot lawfully be described so as to include these peninsulas of established service of adjacent private utilities.

KU has insisted that on July 1, 1957 there were in excess of 70 municipalities served by private power companies, which were entirely surrounded by TVA service and that these islands or pockets of private power service were referred to in the legislative history of the 1959 Act. KU contends that it is inconceivable that anyone could conclude that TVA was the primary source of power supply within these municapilities on July 1, 1957 or that these municipalities could be considered in the area for which TVA was the primary source of power supply on such date.

TVA asserts that these 70 municipalities which plaintiff refers to as being within the primary area are mostly small unincorporated communities which are not municipalities at all. 62 C.J.S. *Municipal Corporations*, § 1d (1949).

KU points out that the fact that TVA's distributor, Powell Valley, on July 1, 1957 supplied 16 customers in KU's defined service corridor in Claiborne County outside of Tazewell and New Tazewell, and 28 customers within the towns, does not affect the conclusion that KU was the primary source of power supply in the defined corridor including the two towns. That Congress recognized that there might be areas where TVA distributors supplied some customers but were not the primary source of power supply. Such areas, it argues, including the KU corridor

and the two towns, therefore, are not part of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

Both TVA and KU recognized that the territorial provisions of the 1959 Act deal with three areas: First, the area of primary service of TVA which consists of approximately 80,000 square miles shown on the large map filed as Exhibit 96, and which, the evidence shows, was used by TVA representatives when they appeared before the Committees of Congress which had the bill under consideration. Second, the additional five mile strip around the periphery of the primary service area. Third, the other areas lying outside the primary area where the TVA or its distributors had generally established electric service on July 1, 1957.

The statute provides in part:

> ". . . the Corporation shall make no contracts . . . making the Corporation or its distributors . . . a source of power supply outside the area for which the corporation or its distributors were the *primary source of power* supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area . . ." (Emphasis added.)

and that

> "Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had *generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.*" (Emphasis added.)

The Court had grave doubt during the trial as to whether the last quoted paragraph referred to the primary area, but is now convinced that it refers to the area in which TVA had established electric service outside of the 80,000 square mile primary area and the additional five mile strip.

The words "Nothing in this subsection shall prevent" appears to be an additional grant of power to serve an area not covered by the preceding paragraph relating to the primary area and the five mile strip, rather than a limitation on the power to serve the primary area.

If the statutory language is clear, it may be given effect in accordance with its provisions without resort to legislative history. *Caminetti* v. *United States,* 242 U. S. 470, 485; *Osaka Shosen Line* v. *United States,* 300 U. S. 98; *U. S.* v. *Oregon,* 366 U. S. 643, 648. But the legislative history supports what we believe to be a logical reading of the language of the Act.

We are told in the briefs that the Senate passed a bill in 1957 which would have permitted TVA to serve the whole of any county lying partly within TVA's existing service area or the Tennessee Watershed, which would have permitted an increase in the area served by TVA from 80,000 to 105,000 square miles. That the bill passed by the House in 1959 would have limited TVA to its existing service area. That the task before the Senate in 1959 was to work out a compromise between these two proposals.

The report of the Senate Committee rejected the term "service area" because it was "nebulous" and because some of the members felt that it would prevent TVA distributors from serving "small areas served by private power entirely surrounded by the lines of TVA's distributors" and "areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced."[1]

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[1] "Under the original TVA Act, Congress provided that the area in which TVA power should be made available would be deter-

(Footnote continued on following page)

Senator Randolph expressed the view that TVA should be encouraged to serve any islands that existed within its geographical operating area as it existed on July 1, 1957.[2]

Senator Randolph and Senator Talmadge sponsored the territorial amendment which was adopted on the Senate floor. If Senator Randolph believed that TVA should be encouraged to serve islands of private power company service within its operating area, it is not likely that he would have sponsored an amendment whose language prevented TVA from rendering service within the primary area.

Senator Cooper objected to the provisions of the Randolph-Talmadge amendment prohibiting service in a

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mined, first by the desire of the people, and second by the economic and engineering feasibility of providing service. The term "service area" is a nebulous one and difficult to define. TVA now has no service area as such. TVA delivers power to points, thus the service area of TVA is the service area of its customers. Although there has been no statutory boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this area was satisfactory and no area limitation was required. Others believed, however, that the stabilization area should be defined and limited by law.

* * * * * *

". . . The area where each distributor sells power is determined by community growth and the relationship between neighboring distributors. Within the general area receiving TVA power there are small areas served by private power entirely surrounded by the lines of TVA distributors. There are also many areas in which the lines of distributors of TVA power and the lines of private power companies are interlaced.

"The committee was of the opinion that the language of the House bill would invite litigation any time that a distributor of TVA power undertook service to a new customer, even within the general area it was already serving. Even if such litigation were eventually resolved in an equitable manner, its existence could raise serious problems in the marketing of the bonds of TVA." [From Report of Senate Committee, H. R. 3460, Report No. 470, pp. 8, 9].

[2] "Of course, consistent with this view TVA should be encouraged to serve any 'islands' which now exist within its geographical operating area as it existed on July 1, 1957." [Supplemental views of Mr. Jennings Randolph on H. R. 3460, p. 56].

municipality outside its primary area of service as he felt that small municipalities near the periphery should be allowed to obtain TVA power. He apparently had no question about its authority under the amendment to serve municipalities inside the periphery.[3]

Representative Davis, the House floor manager for the bill, when explaining the effect of the Senate version stated that the Senate bill drew a line around the periphery of the area for which TVA and its distributors were the primary source of power supply on July 1, 1957.[4]

Statements of sponsors of the bill rather than opponents are usually looked to for legislative history. *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 395; *Duplex Co.* v. *Deering*, 254 U. S. 443, 474-75.

Representative Vinson, an opponent of the bill, felt that the territorial limitations in the Senate bill were more

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[3] "Further, the right of choice of small communities which are near the periphery of TVA ought to be considered. We are not concerned solely by the interests of TVA and private utilities. The small, self-governing communities in the TVA area should have the right to make a choice of whether they will receive power from the Tennessee Valley Authority or from a private utility." [105 Cong. Rec. 13052].

* * * * *

"I am very sorry the Senate has seen fit further to circumscribe the TVA area beyond the committee amendment, and in effect give to the private utilities outside it what I consider to be a monopoly as far as rates outside or near the area are concerned.

"Nevertheless, if my motion to strike shall be defeated, I will vote on final passage for the bill, because I have sponsored self-financing from the outside. I respect the service of private utilities in my own State. I have stood for the right of the people in small communities and cooperatives near the TVA area to have some voice in their choice of power supply." [105 Cong. Rec. 13053].

[4] "As a substitute the Senate bill, in effect, draws a line around the periphery of the area for which either TVA or its distributors were the primary source of power supply on July 1, 1957. It permits additional service within that area." [105 Cong. Rec. 14114 (1959)].

generous to TVA than that of the House bill, but he felt that the limitations in the Senate bill could be justified.[5] He recognized that TVA would have full authority to supply the full power requirements of the primary area.

Representative Scherer, an opponent of the bill, understood that TVA could serve areas already receiving power from another source.[6]

The maps filed as exhibits in this record, Exhibits 94, 95 and 96, and used by TVA witnesses before the Congressional Committee, show that Claiborne County was within TVA's primary service area. One of the maps was presented by KU (Ex. 92) which showed all of Claiborne County in the primary area except a small mountainous part. However, KU filed another map, Exhibit 100, which shows that the Tazewells were served by KU. This map

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[5] "While the territorial limitation by the Senate is more generous to TVA than that of the House, I believe it can be justified. I think, therefore, it is safe to say that this amendment proposed and adopted by the other body, if adopted by the House and enacted into law, will provide a fair and reasonable limitation under which TVA will be allowed to increase its power generating capacity to meet the increased requirements within the area delineated by the amendment, and at the same time give reasonable protection to the privately owned systems, and their investors, and to the municipalities and other governmental organizations dependent upon the privately owned systems as an indispensable source of tax revenue." [105 Cong. Rec. 14122 (1959)].

[6] "However, the total area of such 5-mile extension beyond the present periphery greatly exceeds the 2½ percent or 2,000 square mile limitation provided by the Senate bill. Therefore, TVA during the next few years can pick and choose as it sees fit in this 5-mile extended area such spots as it desires until the 2½ percent or 2,000 square miles have been reached.

"One can readily see that in some places the present periphery will not be extended at all. In other places it may be extended 1 mile beyond the present periphery; in other places, 2 miles or 3 or 4 miles. TVA will pick and choose the best and most lucrative spots in this 5-mile area whenever it gets around to it. In the meantime, private power companies certainly will hesitate to extend their service to anyone within the 5-mile area because there will be no assurance that TVA might not the next day decide to take over that particular area." [105 Cong. Rec. 14125 (1959)].

also shows facilities of KU, including transmission lines that run from Bell County, Kentucky, southeast through the two Tazewells. KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps shows that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell.

As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service.

During the month of June, 1957, in Tazewell, KU supplied 118,737 KWH of electricity while Powell Valley supplied 11,368 KWH, and in New Tazewell KU supplied

116,645 KWH compared to 3,024 KWH supplied by Powell Valley. Considering the two towns together, KU supplied a total of 235,382 KWH to Powell Valley's 14,392 KWH. KU thus supplied 94.2% of the KWH of electricity consumed in these two towns during June, 1957. During the month of July, 1957, in Tazewell KU supplied 106,647 KWH to Powell Valley's 11,410, and in New Tazewell KU supplied 121,440 KWH to Powell Valley's 3,356. In the two towns, KU thus supplied 228,087 KWH during this month to Powell Valley's 14,766 KWH. In July, 1957 KU thus supplied 93.9% of the electric energy consumed in the two towns.

On August 6, 1959, the day the Act became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31.

As of July 1, 1957, KU supplied electric energy to 1,278 customers outside of the municipalities. In 1963, a 34.5 KV transmission line of KU was rebuilt to a 69 KV which is now owned, maintained and operated by KU within this corridor of KU's service area.

On October 30, 1963, the customers of TVA suppliers had increased to over 100 in the municipalities.

The town of Tazewell was incorporated on November 17, 1954 and the town of New Tazewell was incorporated on November 19, 1954. KU and its predecessors had been serving the incorporated areas at least as early as 1920.

In 1952, prior to the enactment of the TVA Act of 1959, KU, TVA and Powell Valley entered into an agreement with respect to means of supplying the loads of KU and Powell Valley. Powell Valley had been serving Claiborne County since 1940. KU and Powell Valley by letter agreement on January 8, 1958, agreed that neither party would serve any customer at any given location, which location was taking service from the other party; that any new load

would be served by the party whose facilities were closest to the load and that the parties would consult with each other in an honest effort to resolve any differences on an equitable basis. The letter agreement provided it should remain in effect for a period of five years and should continue from year to year subject to the right of either party to terminate at the end of any annual extension.

Maps were prepared defining the respective areas. For a number of years, the maps were used to resolve questions which arose as to service to particular customers. This agreement was terminated by Powell Valley some time in 1962 or 1963.

The TVA Board of Directors on August 26, 1964 made an offiical and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.

The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is identical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.

The finding of the Board was made in good faith and supported by substantial evidence.

The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson,* 127 F. Supp. 400.

None of the defendants has induced or conspired to induce any electric customer of KU to breach his or its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint.

/s/ Robt. L. Taylor
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 16491

KENTUCKY UTILITIES COMPANY,
Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY,
POWELL VALLEY ELECTRIC CO-OPERATIVE,
EDWARD J. HARDIN, individually, and as Mayor of Tazewell, Tennessee, and
JAMES B. DEBUSK, individually, and as Mayor of New Tazewell, Tennessee,
Defendants-Appellees.

APPEAL from the U. S. District Court for the Eastern District of Tennessee.

OPINION—Decided November 15, 1966.
(Filed November 15, 1966)

Before: O'SULLIVAN and EDWARDS, Circuit Judges, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This is an appeal from a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, dismissing a com-

plaint for injunctive relief. Plaintiff-appellant, Kentucky Utilities Company, a Kentucky Corporation (hereafter KU) had sought to have Tennessee Valley Authority (hereafter TVA), Powell Valley Electric Cooperative, a TVA distributor (hereafter PVA), and the respective mayors of the cities of Tazewell and New Tazewell, Tennessee, restrained from taking over KU's electric customers in the area of Tazewell and New Tazewell, and generally to restrain TVA and PVA from taking over the supply of electric power to those Tennessee cities.

KU's asserted ground for relief was its claim that it was and had been, before and after July 1, 1957, the primary source of electric power to the consumers in the Tazewells; that in 1963 and prior thereto the municipal authorities of the Tazewells made plans and "conspired" with TVA and PVA to introduce additional TVA power into the area and had commenced to take over KU's customers; and that all of such plans and conduct were and would be violative of an amendment added in 1959 to the Tennessee Valley Authority Act as Section 15d thereof (Public Law 86-137; 73 Stat. 280), which in subsection (a) provides that,

> "Unless otherwise specifically authorized by Act of Congress the Corporation [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply *outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957* * * *." (Emphasis supplied.) Title 16 U.S.C.A. § 831n-4(a).[1]

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[1]The 1959 Act authorized TVA to issue and sell bonds in an amount not exceeding $750,000,000 outstanding at any one time, "to assist in financing its power program," but burdened such

(Footnote continued on following page)

On the critical date, July 1, 1957, KU and PVA were both supplying power in the involved municipalities, but KU supplied 561 customers out of a total of 589, or 95.3% thereof, PVA serving the remaining 28 customers. In the month of June, 1957, KU supplied 228,087 KWH of electricity out of a total 242,853, or 93.9% thereof, PVA supplying the balance of 14,766 KWH. As found by the District

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authority with defined restrictions. We consider that only that portion of the restrictions quoted above is relevant here, but both litigants claim support for their respective positions in the various provisos that follow the quote. We set out the entire restrictions as follows:

"Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

"Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof."

Judge, "On August 6, 1959, the day the Act in question became effective, KU in Tazewell supplied 371 customers to Powell Valley's 19 and in New Tazewell, KU supplied 256 customers to Powell Valley's 12. In the two towns combined, KU supplied a total of 627 customers to Powell Valley's 31." It was the contention of KU that the foregoing and other evidence established that the cities of Tazewell and New Tazewell were "outside the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957," and that TVA and PVA were forbidden additional entry into the area. In defense, TVA and PVA asserted that the basic "area" should not be limited to that part of Tennessee in which KU was the primary source of power, but should encompass that larger portion of Tennessee, including all of Claiborne County, in which TVA and its distributors were in total the primary source of power. In Claiborne County, in which the Tazewells were located, two TVA distributors, PVA and the City of LaFollette Electric System, were suppliers. KU also supplied power outside of the Tazewells along a corridor extending into Tennessee from an area of Kentucky wherein KU was also the primary, if not the exclusive, source of power. While PVA and LaFollette Electric System together may have exceeded KU in customers and power delivered, KU was the largest single source of power supply in the whole of Claiborne County. The District Judge found that in Claiborne County:

> "As of July 1, 1957 Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In

the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,-947.93." 237 F. Supp. at 513.

There was evidence that KU was also the primary source of power in the area of its corridor outside of the Tazewells and that its corridor had total area of about 60 square miles.

The meritorious issue before the District Judge was whether, as contended by KU, and within the meaning of the 1959 Act the cities of Tazewell and New Tazewell were outside the area wherein TVA or its distributors were the primary source of power on July 1, 1957.[2] In addition to their defense on the merits, defendants-appellees pleaded that plaintiff lacked standing to maintain the action. The District Judge concluded that plaintiff had standing to sue but held for defendants on the merits. *Kentucky Utilities Company* v. *Tennessee Valley Authority*, 237 F. Supp. 502 (E.D. Tenn. N.D. 1964).

Defendants-appellees reassert here their defense that plaintiff was without standing to sue, and ask that the judgment of dismissal be affirmed on such ground, regardless of the merits. We defer threshold discussion of this question, believing that the reasons which prompt our disposition of it will be more clearly exposed by our consideration of the merits.

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[2]Plaintiff's complaint also charged all defendants with conspiracy to illegally deprive it of its property in the area in question. The District Judge dismissed this claim and it is not presented by the appeal before us.

We sustain the District Judge's denial of the standing to sue defense, but reverse the judgment which dismissed the cause on the merits.

There is little controversy over the essential and dispositive facts, although the litigant adversaries differ as to their significance. Plaintiff Kentucky Utilities Company is an investor-owned electric public utility, serving customers in about two-thirds of the State of Kentucky, in Claiborne County, Tennessee, and through a subsidiary, in four counties in southwest Virginia. Its transmission lines serving this entire area constitute an integrated and continuous system, and all parts of the area served are substantially continguous. Its Claiborne County, Tennessee, area begins at an area served by it in the State of Kentucky, adjacent to that state's southerly line and then extends along and within a peninsula or corridor into Claiborne County, Tennessee, 15 or so miles to include the cities of Tazewell and New Tazewell. The record before us leaves us uncertain as to the exact width of this corridor and indeed at one point its width and contiguity with the adjoining area may be limited to the dimension of a transmission line at a point where a transmission line of PVA crosses it. This KU corridor is bounded on the east, south and west by TVA distributors and on the north by the main area served by KU itself.

KU's activity in the above area began as early as 1919 and from 1920 it has been serving customers in Tazewell and New Tazewell, which localities became incorporated as cities of Claiborne County in 1954. KU has a non-exclusive franchise to provide electricity to customers in all of Claiborne County. The fixed corporate limits of Tazewell and New Tazewell define the area in which KU on July 1, 1957, was the primary source of the electric power consumed therein. Beginning in 1961 and 1962, citizens and officials of Tazewell and New Tazewell were attracted to the ap-

parently lower rates of PVA,[3] which is a distributor of TVA power in adjacent areas and with the few customers in the Tazewells above referred to. After meetings between representatives of these cities and of Claiborne County with TVA and PVA officials, the two towns decided to set up municipal electric systems which would purchase power from PVA at wholesale rates and re-distribute it. The cities' offer to buy the facilities of KU was refused. Activity toward establishing a municipal system then began, but up to the start of this lawsuit this activity consisted of disconnecting KU's line to several of its consumers and reconnecting them to PVA.

This case was started on November 7, 1963, and any activity thereafter by PVA and TVA in the Tazewells has been suspended in obedience to an order of the District Court.

1. *The merits.*

The meritorious and controlling question is whether Tazewell and New Tazewell were "outside the area for which the Corporation [TVA] or its distributors were the primary source of power on July 1, 1957."[4] The litigants' pleadings presented issues of fact and law to the District Judge, but as discussed hereinafter we do not consider that there was a real controversy over the basic facts. Decision of the case involves determination of the relevant "area"

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[3]KU contends that, properly analyzed, its rates are not less economical to their customers than PVA rates. Resolution of this question, however, is not necessary to our decision.

[4]We need not consider whether, consistent with the 1959 Act, the Tazewells were part of an "additional area extending not more than five miles around the periphery of such area as may be necessary to care *for the growth of the corporation and its distributors within said area.*" (Emphasis supplied.) Neither TVA nor PVA contends that taking over the power distribution in the Tazewells is necessary for the growth of TVA within the area contiguous to the Tazewells if the Tazewells are actually outside of the area for which TVA or PVA were the primary source of supply on July 1, 1957.

within which TVA or its distributors constituted "the primary source of power supply on July 1, 1957." If the relevant area does not include the towns of Tazewell and New Tazewell, then TVA and PVA were, by the 1959 Act, foreclosed from making further contracts for power supply therein. TVA's position that "it and its distributors were the primary source of power supply in the two Tazewells on July 1, 1957" is supportable only if it is permitted to dilute KU's clear primacy in the Tazewells by detaching them from KU's total and contiguous area of service and making them an integral part of territory in which TVA was dominant. On August 26, 1964, after the issues had been drawn and shortly before trial, the TVA Board of Directors adopted the following resolution:

> "That the Board of Directors hereby finds and determines that all of Claiborne County, Tennessee, is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957."

Numerous maps put in evidence showed that KU's corridor into Tennessee was contiguous to its larger area of service in Kentucky and Virginia which admittedly was no part of TVA's service area. The TVA Board's resolution determined that the *periphery* of its area of primary power supply was along the easterly line of Virginia and the southerly line of Kentucky, thus cutting off KU's corridor of power supply in Tennessee from the balance of its area of service. The Board resolved:

> "That the Board finds and determines that a line beginning at the intersection of the States of Tennessee, Virginia and Kentucky and running first south and then west along the line separating Tennessee and Kentucky to the line dividing Claiborne and Campbell Counties, Tennessee [Campbell County abuts on Claiborne on the west] is part of the periphery of the area

for which TVA or its distibutors were the primary source of power supply on July 1, 1957, and is that part of such periphery which touches Claiborne County, Tennessee."[5]

We consider that the District Judge's conclusion was bottomed primarily upon his acceptance of the TVA resolution as dispositive of the case. His opinion recites:

> "The finding of the Board was made in good faith and supported by substantial evidence.
>
> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson*, 127 F. Supp. 400."

(a) Legislative history.

Examination of the legislative history of the 1959 Act has helped our resolution of the question before us. In 1955, TVA was faced with the prospect of rapidly increasing demands for power for its existing customers. It sought a way to meet the cost of new facilities without dependence upon annual national budget considerations. It suggested that Congress give it the power to issue bonds to private and public investors to finance the development. In this effort Senate Bill 2373, 84th Congress, 1st Session (1956) was introduced. This bill contained no territorial limits to the expansion that TVA could accomplish with the proceeds

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[5]KU contends that the periphery of the area in which TVA was the primary source of supply should follow the lines which mark the outer limits of such area and in this case it should have dipped down into Tennessee so as to exclude the corridor in which KU was the primary source of power supply.

of the bonds. Gabriel O. Wessenauer, Manager of Power for TVA, spoke for it before the Congressional Committees which considered legislation that was proposed. He made it clear that territorial expansion was not contemplated, but that TVA sought power and finances to insure sufficient capacity to accommodate the growth of the system load. *Cf. Hearings, Senate Committee of Public Works,* 84th Congress, 1st Session, S 2373, pp. 65, 79 (1956). The Committee understood this to be TVA's limited objective. Senator Cotton remarked, "Its [TVA's] purpose is to have growth rather than expansion in that you may have more electricity, more power to serve the territory that you presently serve." Id. at 114. At the time this legislation was under consideration, the area served by TVA and its distributors had more or less stabilized; this area comprised all of the State of Tennessee except the peninsula or corridor involved here (and some other areas not of materiality here) as well as parts of Kentucky, Virginia, Georgia, Alabama and Mississippi bordering on Tennessee. The history of troubles and collisions between TVA and private power companies was of course known to Congress, but a degree of repose had existed for some time. Congress, as the source of money, had exercised power over TVA's geographic growth, but possession by TVA of authority for self-financing might indeed call for substitute controls upon its expansion. S 2373 was never passed, and two years later, in 1958, two new bills, HR 3236 and HR 4266, 85th Congress, 1st Session, were proposed. These bills also made no provision for any territorial limitations. This was a cause of concern to some members of Congress. A typical inquiry was, "Can the TVA Directors issue bonds to expand its area outside of the district now covered by TVA?" An answer was made, "* * * there has not been a single instance in the history of this Committee in which the Tennessee Valley Authority has gone in to 'raid' any

utility's territory." *Hearings, House Committee on Public Works,* 85th Cong. 1st Sess., HR 3236 and HR 4266, p. 16 (1958). TVA's Wessenauer added "We have not run any parallel lines for 10 to 20 years." *Id.* at 94. A statement by a representative of the private power companies that the bill posed the "threat of geographic as well as capacity expansion" was dismissed by a supporter of the bill as the raising of an old "bogey." *Id.* at 156-159.

After the above bills failed of enactment, four new ones were introduced into the Senate: S 1855 which proposed to limit TVA to its "service area" as of July 1, 1957; S 1869 which merely required TVA to allow Congress 60 days to veto any proposed expansion before beginning it; S 1986 which would have limited TVA to replacing existing facilities; and S 2145 which would have required congressional approval for any expansion. Although none of these bills became law, it had become apparent that definition and imposition of some limitation on TVA growth was going to have to be a part of any successful bill.

In 1959, H.R. 3460, which ultimately became the 1959 TVA Act, was introduced. As offered, this bill would have limited TVA to "counties lying in whole or in part within either the Tennessee River drainage basin or the service area in which power generated by the Corporation is being used on July 1, 1957." During the hearings before the House Public Works Committee, Rep. Vinson proposed an amendment to limit TVA solely to its July 1, 1957, service area, and with some minor amendments to make provision for peripheral adjustment and a slight change of language, this ultimately became a part of the Act.

In discussing the intent of his amendment, Rep. Vinson referred to the existence of various accomodations which had been reached dividing and delineating the areas of service between the Alabama Power Corporation and TVA, *cf Hearings, Senate Committee on Public Works,* 86th

Cong., 1st Sess., S 931 and H.R. 3460 pp. 39-51 (1959); between the Georgia Power Co. and TVA, *Id.* at 220, and indeed in our own case between KU and PVA.[6] Rep. Vinson stated that his amendment "writes into the law the 'gentlemen's agreement.'" *Hearings,* 86th Cong., 1st Sess., *House Committee on Public Works,* H.R. 3460, p. 111 (1959).

Three months later, H.R. 3460 was before the Senate Committee, together with S 931, a bill which more or less conformed to the version of H.R. 3460 originally submitted to the House Committee. The threat of possible expansion of TVA under S 931 excited numerous and vigorous protestations from representatives of power companies, whose statements consume some 70 pages of the report. *Senate Committee on Public Works,* 86th Cong., 1st Session, S 931 and H.R. 3460, pp. 170-240 (1959). Ultimately, S 931 was rejected, and H.R. 3460 was reported out and passed.

In the Senate report (No. 470, 86th Cong., 1st Sess., 1959) on the final version of H.R. 3460, the Senate noted:

> "Although there has been no *statutory* boundary established, there has been no material increase for about 15 years in the area supplied by power from TVA. It was generally agreed by many that the working arrangement that now exists with respect to this

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[6] In 1958 a written agreement was made between KU and TVA's distributor, PVA. Fairly read, this agreement provided that KU and PVA would mutually avoid "raiding" customers in their respective areas. To insure understanding and delineation of such areas, engineer representatives of KU and PVA collaborated in the preparation of a map which, upon its completion in 1960, showed the Tazewells as part of the territory in which KU was the primary source of power. After the activity to have additional TVA power brought into the Tazewells, PVA gave notice of termination of its 1958 agreement with KU. With reference to some new projects then contemplated for the Tazewells, a TVA District Manager, on October 18, 1962, recited in a memorandum to TVA's Director of Power Marketing that "Under the territorial agreement between the Cooperative [PVA] and KU, effective January 16, 1958, *both of these projects are in KU's territory.*" (Emphasis supplied.)

area was satisfactory and no area limitation was required. *Others believed, however, that the stablization area should be defined and limited by law.*" *U. S. Code Cong. and Adm. News,* 86th Cong., 1st Sess. 1959, p. 2007. (Emphasis supplied.)

The "others" were those who supported the Vinson Amendment which become a part of the bill.

From all of this it is apparent that Congress intended that in exchange for the free hand it was giving TVA in financing further development, it required that such development was to be kept within "the area for which [it] * * * or its distributors were the primary source of power supply on July 1, 1957." The language of Congress was clear and the "area" to which TVA was to be confined was ascertainable from conditions which existed on the critical date of July 1, 1957.

But, TVA argues, the 1959 Act must be read as committing to its Board of Directors authority to determine "the area" in which it was the primary source of power on that date. We find no words in the Act which directly or impliedly delegated to TVA's Board such authority. From the evidence in this record, we are convinced that as a matter of undisputed fact the cities of Tazewell and New Tazewell were, on July 1, 1957, a part of and *within* the total area served by KU and in which KU was the primary source of power supply. If so, they were *outside* of the area in which TVA or PVA were such primary source, and the latter were therefore statutorily forbidden from therein making contracts "for the sale or delivery of power."

The District Judge arrived at his decision primarily upon acceptance as having been made in good faith and on substantial evidence, the resolution of the TVA Board of Directors, made on the eve of trial, that the Tazewells were within the TVA area. If such acceptance of the Board's

resolution amounts to a finding of fact, we consider that it was clearly erroneous. Fed. R. Civ. P. 52(a).

TVA argues that because several maps purporting to disclose the area of its service, which it furnished to the Congressional Committees considering the legislation, showed all of Claiborne County as within said area and did not disclose KU's corridor into Tennessee, it should be assumed that Congress by its Act made all of the County a part of "the area" of TVA. On trial, however, TVA's witnesses conceded that these maps were intended to be only "rough approximations" of its total area. The evidence disclosed that they failed to portray the numerous places where peninsulas or corridors contiguous to and parts of non-TVA areas intruded across the perimeter of and into the area portrayed as being exclusively that of TVA.

(b) Other evidence indicating the area of TVA-supplied power.

We have detailed above undisputed evidence that KU's corridor which included the Tazewells was contiguous to an area of Kentucky in which KU was not only the primary but the exclusive source of power supply. This was also confirmed by maps annually prepared by TVA to portray its "Transmission System." These maps covered years prior and subsequent to 1957, and subsequent to the effective date of the 1959 Act. In each of these maps, the KU corridor was shown as a continuation of KU's area in Kentucky and not as part of TVA's area. The corridor's boundaries and outline were not precisely delineated and New Tazewell was not shown as within the intruding corridor, but it is not claimed that New Tazewell was in fact outside the corridor. There was also in evidence a detailed map prepared in 1960 by the joint work of engineers for KU and PVA (the "Rowe-Osborne" map) which precisely delineated the line which separated the respective areas of these utilities. The Tazewells were within KU's area which ex-

tended north to the Tennessee-Kentucky line and the Tennessee-Virginia line. On the Tennessee side of the Kentucky-Tennessee line are Cumberland Gap and other municipalities in which KU was the exclusive source of power. The TVA Board resolution, however, determined that the "periphery" of TVA's area was along the northerly line of Claiborne County which is the Kentucky-Tennessee state line—this notwithstanding that the area in which KU was either the exclusive or primary source of electric power lay on both sides of the "periphery" adopted by its Board. Thus the Board "lopped off" from KU's area its corridor extending into Claiborne County and resolved that all of Claiborne County, including the Tazewells, was part of "the area" in which TVA was the primary source of electric power.

Among the map exhibits was one prepared by TVA in 1952 and delivered to KU's power engineers with a letter from one DeMerit, TVA's Chief Power Engineer. The letter described the map as "showing the areas now served by the LaFollette Electric Department, the Powell Valley Electric Cooperative and the Kentucky Utilities in the *Cumberland Gap-Tazewell Section of Tennessee.*" (Emphasis supplied.) The map, Exhibit 36, shows the KU corridor extending without break and with substantial width from KU's area in Kentucky and Virginia southerly to and including the Tazewells.[6a]

It appears to us that except for the maps presented to the Congressional Committees as "rough approximations," the maps prepared by TVA engineers, or in the making of which they collaborated, and the physical facts could be

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[6a] This is the same Exhibit 36 which is attached to the dissent. The dissent asserts that it portrays "KU's view of the same problem * * *." This is true, but as pointed out in the above text, this map was the production, not of KU engineers, but was made by *TVA* engineers to show *their* view of the areas served by the respective utilities.

consistent only with a finding that the Tazewells on July 1, 1957, were outside of an area in which TVA was the primary source of power. We are persuaded also that TVA's "rough approximation" maps were not intended to deal specifically with KU's relatively small peninsula extending as a part of its total area into Tennessee. Until about 1960 when the activity to have TVA take over the supply of power to the Tazewells commenced, all of TVA's own activities were consistent only with the conclusion we have reached. Its Board's resolution, adopted to sustain its position in this lawsuit, could not change the facts.

We should make clear that we are not deciding whether the involved 1959 Act would forbid TVA from entering into or expanding its service within areas served by private utilities where such areas are but islands within a larger area in which TVA is primary. Tazewell and New Tazewell are not such islands, but are attached to the "mainland" of KU's area of primary service. The fact that a line or lines of PVA may at one or more points enter into this corridor or, as the evidence shows, at one point cross one of KU's transmission lines, does not make islands of Tazewell and New Tazewell. We do not consider that the District Judge's recitation that:

> "KU referred to this location throughout the trial as a corridor or peninsula served by it. Maps show that the lines of Powell Valley crossed the lines of KU at one point in the so-called corridor. Some maps also show that the lines used to serve Powell Valley customers surround the towns. The TVA prepared maps over a period of years which showed that KU served Tazewell and New Tazewell."

was a finding of fact that the Tazewells were "islands."

There was evidence that it would be economically advantageous to consumers in the Tazewells to receive their

power from TVA, either directly from PVA or through municipally owned systems. Whether TVA is in good faith seeking to help the citizens of Tazewell and New Tazewell obtain the benefits which flow from TVA is an irrelevant question here. We hold that the 1959 Act now forbids the involved expansion of TVA.

(c) Reviewability of TVA Board's determination.

Appellees assert that the District Judge made his own finding of fact on the critical issue, independently of the TVA Board's finding, and that under 52(a) Fed. R. Civ. P., such finding binds us, absent a valid conclusion by us that his finding of fact was clearly erroneous. We read the District Court opinion, however, as accepting the TVA Board's resolution as dispositive of the case, but if his decision in total amounts to a finding of fact, we consider it erroneous within the meaning of the mentioned rule.

As an alternative position, TVA contends that the 1964 resolution of its Board of Directors, made for the purpose of and on the eve of trial, was beyond judicial review. It is clear that such resolution was the product of advice provided by memoranda presented by TVA's Manager of Power, Mr. Wessenauer, and its General Counsel. The "rough approximation" maps which Wessenauer had presented to the Congressional Committees accompanied his memorandum. He advised the Board:

> "The approximate location of the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, is reasonably clear, but to draw a precise line at any location requires a detailed study of the operations of each distributor with lines at that point. It has not been thought that the advantages to be derived from drawing a precise line around the periphery of the

entire area served by TVA power would justify the time and expense involved in making the necessary studies."

With reference to his Congressional Committee maps, he said:

"The maps cannot be relied on to determine exact lines but they show the general area which Congress had in mind as the service areas of such distributors. Each of the maps shows all of Claiborne County as within the area served by TVA."

The General Counsel's memorandum included the following:

"The determination of the exact dimensions of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957, and the fixing of the periphery of such area in situations in which a line must be drawn in the administration of the TVA Act is a responsibility which Congress has placed on the TVA Board.

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"The question then is one of determining the periphery of the area. From Mr. Wessenauer's memorandum and the attached maps it appears that everything south and east of Cumberland Mountain (as well as the extreme northwestern part of the County) with the possible exception of the area around Cumberland Gap, is within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957.

"A closer question is whether the periphery should be drawn to include all of Claiborne County or should dip down to include Mingo Hollow and again to exclude the area in the vicinity of Cumberland Gap. This is a

matter for the Board to decide. It is my view that, considering the relatively small area included in these portions of the county, and the legislative history showing an understanding by the Congress that all of Claiborne County was within the TVA area, the Board can properly resolve this question by finding that all of Claiborne County is within the area for which TVA or its distributors were the primary source of power supply on July 1, 1957,[7] and can properly define as part of the periphery of such area a line from the intersection of Tennessee, Virginia and Kentucky along the Kentucky-Tennessee border to the line separating Claiborne and Campbell Counties."

Appellees support their argument on this point by citing cases which hold that where Congress has committed to a government agency the responsibility for making determinations preliminary to executive or administrative action, such determinations are beyond judicial review. We, however, do not find that Congress, directly or indirectly, left it to TVA to determine "the area for which [it was] the primary source of power supply on July 1, 1957." Whether the Tazewells were or were not outside such area depended upon existing, unchangeable and ascertainable facts, and not upon discretionary or administrative action of the TVA Board. If, in fact, the Tazewells were outside the area where TVA was primary, a contrary resolution by the TVA Board could not change the fact.

Leading cases supporting the doctrine invoked by appellees are *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U. S. 309 (1958); *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. Ed. 559 (1840); *United States* v. *Black*, 32 L. Ed. 354 (1888); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 84 L. Ed. 1108

[7] H. R. 3460, as originally presented, indicated an intention to use *counties* as the area within which to determine the controlling service area. But such language was eliminated in the final draft.

(1940). We will not attempt review of these and other cases cited, other than to observe that they involved the responsibility and right of executive and administrative agencies to make determinations essential to the exercise of granted power. The portion of the 1959 statute before us gave TVA authority to finance its development by issuance of bonds, but imposed specific restraints upon the future activities of TVA. We consider that the language of restraint was clear and did not need interpretation, discretionary or otherwise. Enforcement of the restraint is a judicial function. *Stark* v. *Wickard,* 321 U. S. 288, 309-310 (1944); *Peters* v. *Hobby,* 349 U. S. 331, 345 (1955); *Leedam* v. *Kyne,* 358 U. S. 184, 188 (1958). The District Judge did hold that the finding of the TVA Board was subject to his review and notwithstanding his reliance on the Board's resolution said:

> "It is the duty of the Court to construe the Act and to determine whether TVA acted within its authority under the Act. *Stark* v. *Wickard,* 321 U. S. 288, 309-310; *National Bank of Detroit* v. *Wayne Oakland Bank, supra,* [252 F(2) 537, (CA 6, 1959) *cert. den.* 358 U. S. 830] *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U. S. 316."

We hold that the resolution of the TVA Board did not foreclose the testing of its validity by the District Judge or by this Court on this appeal.

2. *KU's standing to sue.*

KU does not have an exclusive franchise and, accordingly, has no contractual, statutory or constitutional right to be free from competition. KU's complaint, however, does not ask a decree protecting it from all competition. It asks that TVA and PVA be enjoined from violating the 1959 Act by expanding its sale of power into the Tazewells, cities which are outside of TVA's primary area. We are satisfied

that the Act's restrictions on TVA expansion were incorporated to protect KU and other established utilities from the destructive consequences of intrusion of TVA power into areas where such utilities had already been established as the primary source of power and which areas were "outside" of TVA's primary area.

The Senate Committee's report reviewing the plan and purpose of H.R. 3460, the bill enacted, recited that among other objectives of its Territorial Limitation was a purpose to "protect the areas now being served by private utilities." *U. S. Code Congressional and Administrative News*, 86th Congress, 1st Session, p. 2008 (1959). Remarks made by members of Congress make clear that concern for the rights of KU and other utilities in like situations prompted the limitations placed on TVA. Such being so, we believe that the courts are open to KU to seek protection of the rights which Congress created for it.

Of the cases relied on by appellees on the question of plaintiff's standing to sue, *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 82 L. Ed. 374 (1938); *Tennessee Electric Power Company* v. *TVA*, 306 U. S. 118, 83 L. Ed. 543 (1939); and *Kansas City Power & Light Company* v. *McKay*, 225 F(2) 924 (CA D.C. 1955) *cert. den.*, 350 U. S. 884, speak most directly to the subject. All of them involve efforts by private utilities to get court relief from the competition of publicly owned or supported power facilities which were creatures of the Federal Government's entry into the power business. The right to sue and the asserted ground for relief in each case were bottomed upon broad claims of unconstitutionality of the federal power program, illegality in the means whereby competitors of private utilities had or would obtain the funds to set up their operations and other charges of illegality in the establishment of the plaintiffs' competitors. Such plaintiffs were held to be without standing to sue. Their surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted

on a federal statute enacted specifically for the protection of the involved plaintiff. The plaintiff utilities did not have exclusive franchises, and the cases hold that where there is no constitutional or common law right to be free of competition and where the hurting competition is valid as competition, the courts will not restrain it because of some antecedent illegality in its creation or in its obtaining of funds. Without attempting detailed analysis of the facts of each of these cases and the court's reasoning, we recite language from *Tennessee Electric* which we believe most nearly expresses the theory underlying all three of the cases. Speaking of the plaintiff's assertions, Justice Roberts said:

> "This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is ultra vires, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution."

and Justice Roberts then concludes that "[t]he contention is foreclosed by prior decisions that the damage consequent on competition, *otherwise lawful,* is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." 306 U. S. 139, 140, 83 L. Ed. 550, 551. (Emphasis supplied.)

Relying upon these principles, TVA asserts that KU has no right to be free of competition, that the municipalities have the right to set up their own electric power plants to compete with plaintiff and, therefore, it is no business of KU where these municipal systems obtain their power.

But KU does not contend that the Tazewells are forbidden such competition with it, and it does not challenge their source of power except—and this is the big distinction here—that it does claim the right to ask judicial enforcement of a limitation on the source of its competitors' power, which limitation Congress made into law for its benefit.

No precedent answers this question precisely, but we believe that there is ample authority for our affirmance of the District Judge's view that plaintiff had standing to sue. In *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F(2) 537, 544 (CA 6, 1958), where the plaintiff bank charged violation of federal and state statutes by the Comptroller of the Currency's grant of authority to open a branch bank, we said:

> "As to the standing of The Wayne Oakland Bank to maintain its suit, it was faced with invasion of property rights, and injury from a competition which was prohibited by the federal statutes * * *. Whether the rights of a party are infringed by unlawful action of an individual or by exertion of unauthorized federal administrative power, it is entitled to have such controversy adjudicated."

In *Stark* v. *Wickard,* 321 U. S. 288, 88 L. Ed. 733 (1944) standing to sue the Secretary of Agriculture by a milk producer who asserted that the Secretary's action offended a statute creating rights in plaintiff was sustained by the Supreme Court which said:

> "Here, there is no forum, other than the ordinary courts, to hear this complaint. When * * * definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved

> person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. * * * The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. *Cf. United States* v. *Morgan*, 307 U. S. 183, 190, 191, 83 L. Ed. 1211, 1216, 1217, 59 S. Ct. 795." 321 U. S. at 309-310, 88 L. Ed. at 747-748.

In *Leedom* v. *Kyne*, 358 U. S. 184 (1958) dealing with and sustaining a District Court's jurisdiction to hear a complaint which charged the NLRB with illegal conduct, the Supreme Court said:

> "This case, in its posture before us, involves 'unlawful action of the Board [which] has inflicted an injury on the [respondent].' Does the law, 'apart from the review provisions of the . . . Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review,' in the sense of that term as used in the act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U. S. 188.

See also, *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964); *Texas & P. R. Co.* v. *Rigsby*, 241 U. S. 33, 39-40, 60 L. Ed. 874, 877 (1916). It would be useless for Congress to include distinct limitations upon the expansion plans of such public corporations as TVA if there was no way to force them to keep within such limitations.

We hold that KU had standing to sue and on the merits should have been accorded appropriate relief. This disposition makes it unnecessary that we consider other contentions made by KU in support of its claim for relief.

Judgment of dismissal is reversed and the cause is remanded for further proceedings consistent herewith.

EDWARDS, Circuit Judge, dissenting. The majority opinion would in my view construe statutory restrictions in the 1959 Tennessee Valley Authority Act, 73 Stat. 280 (1959), 16 U.S.C. § 831n-4 (1964), much more narrowly than it appears to me Congress intended. The Tennessee Valley Authority sought authority from Congress to issue revenue bonds to expand its facilities for furnishing electric power within the general area served by TVA. The bill proposed by TVA was opposed vigorously by privately owned power companies whose service areas impinged upon TVA's. As a result of this opposition, when the 1959 TVA Act was passed, it contained language generally restricting the areas which TVA could supply to those which it was serving as the primary source of power on July 1, 1957, and to an area no more than five miles outside the perimeter of such area.

The limiting provision follows:

> "Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside *the area* for which the Corporation or its distributors were the *primary source of power supply on July 1, 1957*, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area: Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957: And

provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

"Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act. . . ." (Emphasis supplied.) 73 Stat. 280 (1959), 16 U.S.C. 831n-4(a) (1964).

This action is a suit for an injunction by Kentucky Utilities Company against TVA seeking to restrain it from providing electric power to two municipal electric distribution systems in the towns of Tazewell and New Tazewell, Tennessee. The two major parties agree only on the fact that legal construction is needed for the words "area" and "primary source of power" in the first clause of the portion of 16 U.S.C. § 831n-4, the 1959 TVA Act which we have quoted.

Briefly put, it is the contention of KU that its area of service reaches down from Kentucky into Claiborne County, Tennessee, in a narrow peninsula of service along its transmission line, and that it represented the primary source of power supply on July 1, 1957, for the towns of Tazewell and New Tazewell, Tennessee.

Briefly put also, TVA's position is that TVA's power lines, through its subsidiary, Powell Valley Electric Cooperative, criss-crossed all of Claiborne County on the crucial date of July 1, 1957, and served a portion of the

Tazewells and plainly, in TVA's contention, represented the primary source of power for Claiborne County.

TVA also points out factually that its transmission line of Powell Valley cut across KU's transmission line rendering KU's Tazewell facilities an island.

TVA's view of the "area" concerned in this matter is portrayed by its Exhibit 91. (Attached hereto following page 27.)

KU's view of the same problem is dramatically different, as shown in Exhibit 36. (Attached hereto following page 27.)

Although it seems unlikely, both exhibits refer to this same dispute and to the same general geographical locality.

It is clear, as the District Judge who heard this case found, that TVA was the dominant supplier of electric power in Claiborne County while KU was the dominant supplier of electric power within the city limits of Tazewell and New Tazewell.[1]

---

[1] "As of July 1, 1957, Powell Valley and the City of LaFollette Electric System (the other TVA supplier for Claiborne County) supplied power to a total of 3,564 consumers in Claiborne County and KU supplied power to 1,839 consumers. In June, 1957 Powell Valley and LaFollette had combined kilowatt-hour sales of 1,025,793 as against 626,043 kilowatt-hours for KU. In the same month, the combined kilowatt demand for Powell Valley and LaFollette was 3,125 kilowatts as against 2,338 for KU. The depreciated plant investment in distribution facilities of Powell Valley and LaFollette (as of January 10, 1957 for Powell Valley and as of June 30, 1957 for LaFollette) was $902,999.17 as against KU investment on June 30, 1957 of $457,947.93.

"On July 1, 1957, in Tazewell, KU supplied the electric energy requirements of 344 customers and Powell Valley supplied the requirements of 20 customers, and in New Tazewell KU supplied 217 customers and Powell Valley supplied 8 customers. Considering the two municipalities together, KU had a total of 561 customers and Powell Valley 28 customers. KU on such date served in these two municipalities 95.3% of the customers receiving electric service." (Quoted from Trial Judge's Memorandum Opinion, Appellant's Appendix at pp. 49a-50a.)

It is also clear that neither of these utilities had any exclusive franchise to serve any territory here in dispute. It is also clear that KU had many customers in Claiborne County, while TVA had customers in both Tazewell and New Tazewell on the critical date.

After an interesting review of the Congressional history of the 1959 TVA Act, Judge Taylor concluded:

> "The TVA Board of Directors on August 26, 1964 made an official and formal finding to the effect that all of Claiborne County, including the towns of Tazewell and New Tazewell was within the periphery of the area for which TVA or its distributors were the primary source of power supply on July 1, 1957. At the time of the determination, the Directors had before them the four maps that were submitted to the Committees of Congress by the witnesses for TVA.
>
> "The area within Claiborne County determined by the TVA Board to be within the area for which TVA or its distributors were the primary source of power supply in July 1, 1957 is indentical to the areas shown as served by the TVA distributors on the maps furnished by TVA to the Congressional Subcommittee.
>
> "The finding of the Board was made in good faith and supported by substantial evidence.
>
> "The history of the 1959 Act supports the finding of the TVA Board that Tazewell and New Tazewell were within the primary area served by TVA and its suppliers as of July 1, 1957. We do not believe that Congress in the 1959 Act intended to exclude the two Tazewells from the primary service area served by TVA and its suppliers as of July 1, 1957. *U. S.* v. *Burleson,* 127 F. Supp. 400.
>
> "None of the defendants has induced or conspired to induce any electric customer of KU to breach his or

its contract with KU and none has been guilty of bad faith, fraud or deceit in the securing of electric power customers within the two municipalities.

"It results that the proof fails to show that plaintiff is entitled to any of the relief sought in the complaint."

The maps to which Judge Taylor refers are before this court. They were before Congress when it passed the disputed legislation. Tazewell and New Tazewell are clearly within both the Tennessee watershed and the perimeter of the TVA service area as it was outlined to Congress. In these cities on July 1, 1957, no private utility had any exclusive franchise, and in fact, TVA was then furnishing power to customers. In addition, the cities are located in a county where TVA clearly was the primary source of power on July 1, 1957. Under this set of facts, I do not see how we can properly interpret the 1959 TVA Act as making illegal a finding of fact by the Board of TVA that it was "the primary source of power" for "the area" concerned on July 1, 1957. The 1959 TVA Act and its relevant amendment seem to me to support TVA authority to make this finding. (73 Stat. 280 (1959), 16 U. S. C. 831 (1964). See in particular 16 U. S. C. 831i and 16 U. S. C. 831h-4). Judge Taylor so interpreted the Act and found "substantial evidence" to support the crucial finding.

I believe that Judge Taylor's interpretation and application of the statutory language represents both logical construction of the statutory language and compliance with Congressional intent.

I concur with my brothers' view that the 1959 TVA Act should be construed as giving KU standing to bring this suit, but I would affirm the District Judge's order dismissing same for the reasons given above and in his complete opinion.

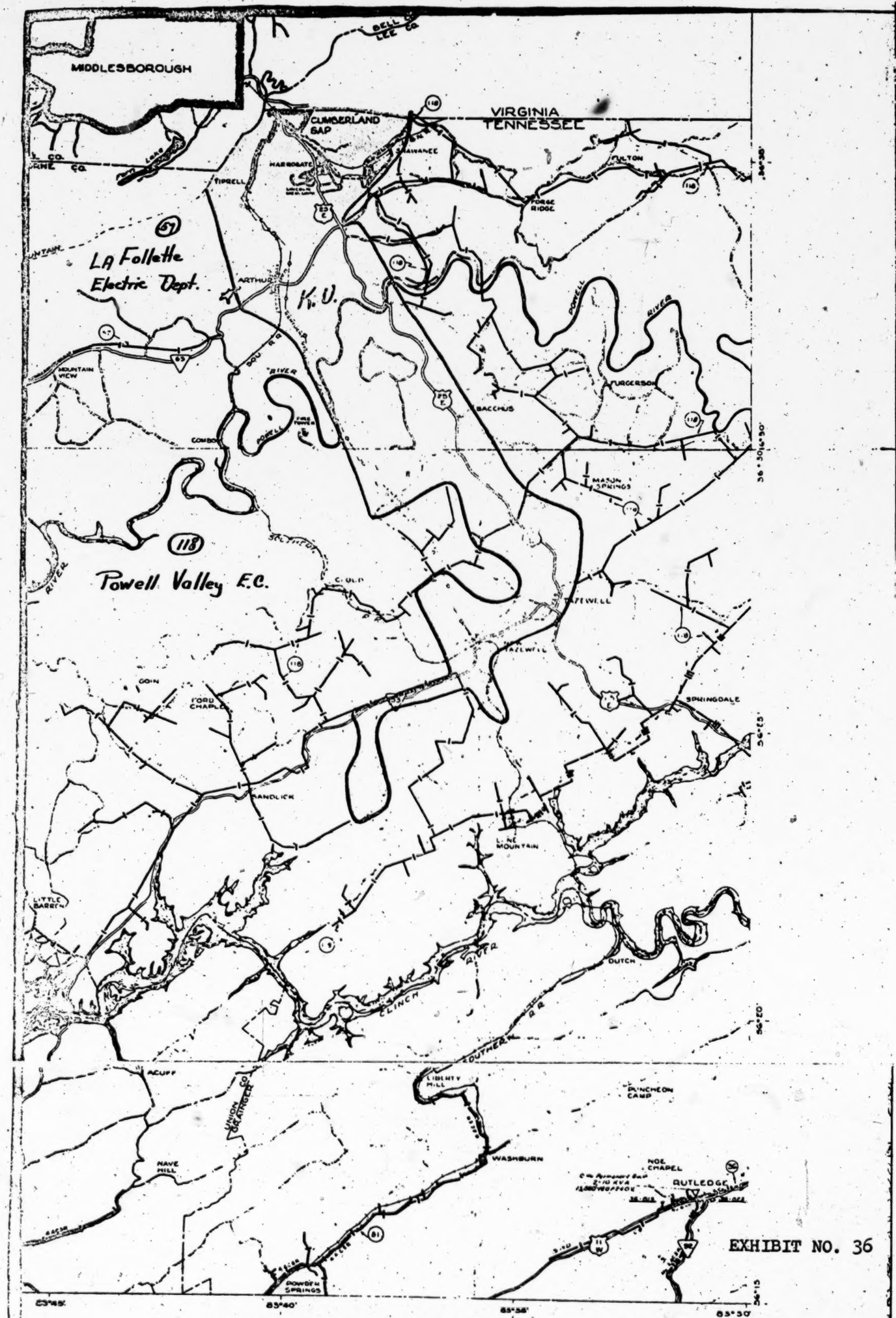


EXHIBIT NO. 36

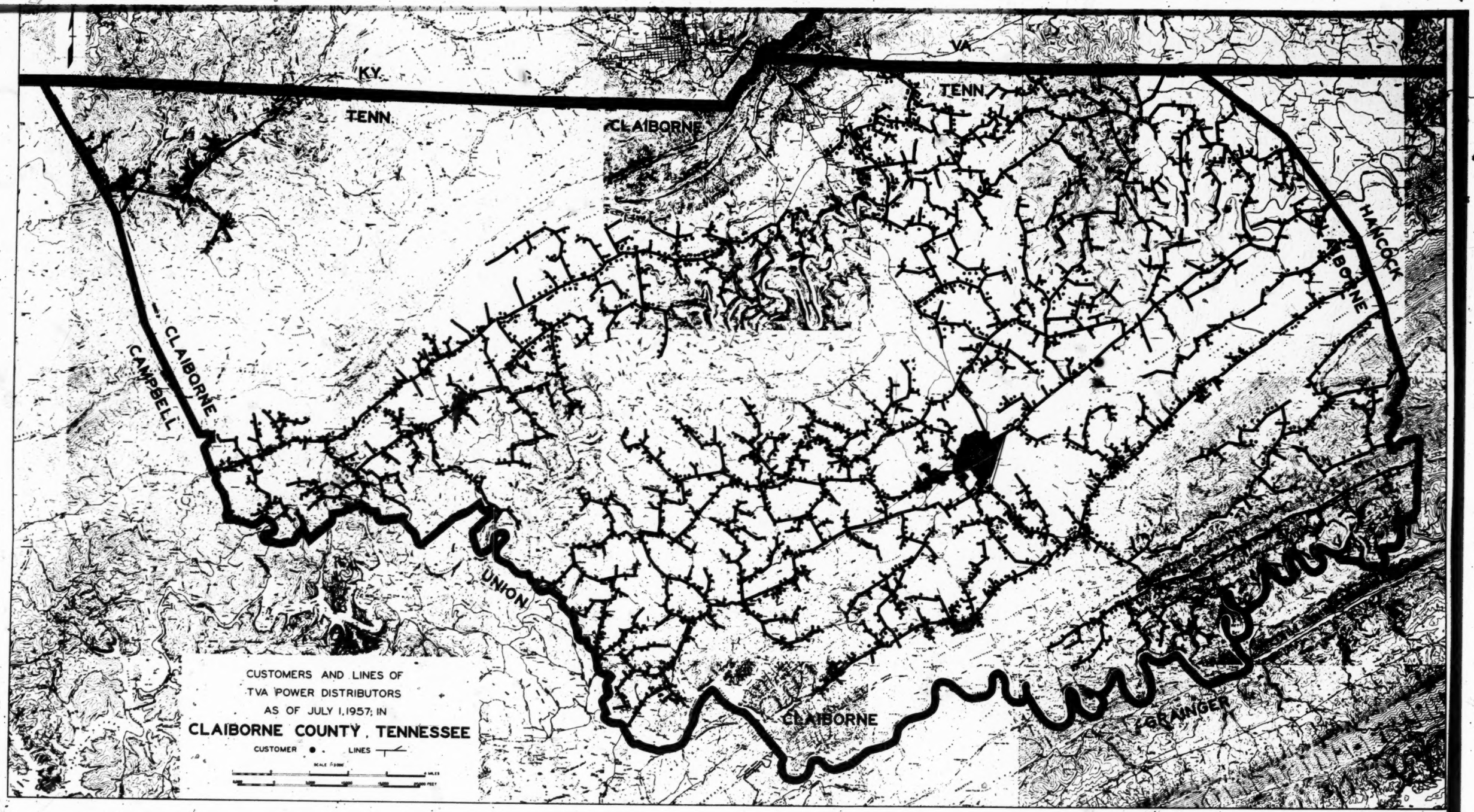
COOPERATIVES AND MUNICIPALITIES OPERATING RURAL DISTRIBUTION LINES IN THIS AREA

(36) APPALACHIAN ELECTRIC COOPERATIVE
(81) KNOXVILLE ELECTRIC POWER AND WATER BOARD
(57) LA FOLLETTE ELECTRIC DEPT.
(118) POWELL VALLEY ELECTRIC COOPERATIVE

TENNESSEE VALLEY AUTHORITY
DEPARTMENT OF OPERATIONS
TRANSMISSION AND RURAL DISTRIBUTION LINES IN CAMPBELL, CLAIBORNE, UNION AND GRAINGER COUNTIES, TENNESSEE

DATE: 9-13-46
E.A.R.
E.A.S.
W.L.F.

36-3
L-C-30



Map of Claiborne County, Tennessee, showing customers and lines of distributors of TVA power as of July 1, 1957

Exhibit No. 9

APPENDIX C

PERTINENT SUB-SECTION OF TVA 1959 FINANCING ACT.

(As Amended by PL 89-537—1966)
16 U.S.C. § 831n-4

Bonds For Financing Power Program—Authorization; Amount; Use of Proceeds; Restriction on Contracts For Sale or Delivery of Power; Exchange Power Arrangements; Payment of Principal and Interest; Bond Contracts.

(a) The Corporation is authorized to issue and sell bonds, notes, and other evidences of indebtedness (hereinafter collectively referred to as "bonds") in an amount not exceeding $1,750,000,000 outstanding at any one time to assist in financing its power program and to refund such bonds. The Corporation may, in performing functions authorized by this chapter, use the proceeds of such bonds for the construction, acquisition, enlargement, improvement, or replacement of any plant or other facility used or to be used for the generation or transmission of electric power (including the portion of any multiple-purpose structure used or to be used for power generation); as may be required in connection with the lease, lease-purchase, or any contract for the power output of any such plant or other facility; and for other purposes incidental thereto. Unless otherwise specifically authorized by Act of Congress the Corporation shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the Corporation or its distributors were the primary source of power supply on July 1, 1957, and such additional area ex-

tending not more than five miles around the periphery of such area as may be necessary to care for the growth of the Corporation and its distributors within said area; Provided, however, That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its distributors were the primary source of power supply on July 1, 1957; And provided further, That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957, nor prevent the Corporation from continuing to supply power to Dyersburg, Tennessee, and Covington, Tennessee, or from entering into contracts to supply or from supplying power to the cities of Paducah, Kentucky; Princeton, Kentucky; Glasgow, Kentucky; Fulton, Kentucky; Monticello, Kentucky; Hickman, Kentucky; Chickamauga, Georgia; Ringgold, Georgia; Oak Ridge, Tennessee; and South Fulton, Tennessee; or agencies thereof; or from entering into contracts to supply or from supplying power for the Naval Auxiliary Air Station in Lauderdale

and Kemper Counties, Mississippi, through the facilities of the East Mississippi Electric Power Association: Provided further, That nothing herein contained shall prevent the transmission of TVA power to the Atomic Energy Commission or the Department of Defense or any agency thereof, on certification by the President of the United States that an emergency defense need for such power exists. Nothing in this chapter shall affect the present rights of the parties in any existing lawsuits involving efforts of towns in the same general area where TVA power is supplied to obtain TVA power.

The principal of and interest on said bonds shall be payable solely from the Corporation's net power proceeds as hereinafter defined. Net power proceeds are defined for purposes of this section as the remainder of the Corporation's gross power revenues after deducting the costs of operating, maintaining, and administering its power properties (including costs applicable to that portion of its multiple-purpose properties allocated to power) and payments to States and counties in lieu of taxes but before deducting depreciation accruals or other charges representing the amortization of capital expenditures, plus the net proceeds of the sale or other disposition of any power facility or interest therein, and shall include reserve or other funds created from such sources. Notwithstanding the provisions of section 831y of this title or any other provision of law, the Corporation may pledge and use its net power proceeds for payment of the principal of and interest on said bonds, for purchase or redemption thereof, and for other purposes incidental thereto, including creation of reserve funds and other funds which may be similarly pledged and used, to such extent and in such manner as it may deem necessary or desirable. The Corporation is authorized to enter into binding covenants with the holders of said bonds—and with the trustee, if any—under any

indenture, resolution, or other agreement entered into in connection with the issuance thereof (any such agreement being hereinafter referred to as a "bond contract") with respect to the establishment of reserve funds and other funds, adequacy of charges for supply of power, application and use of net power proceeds, stipulations concerning the subsequent issuance of bonds or the execution of leases or lease-purchase agreements relating to power properties, and such other matters, not inconsistent with this chapter, as the Corporation may deem necessary or desirable to enhance the marketability of said bonds. The issuance and sale of bonds by the Corporation and the expenditure of bond proceeds for the purposes specified herein, including the addition of generating units to existing power-producing projects and the construction of additional power-producing projects, shall not be subject to the requirements or limitations of any other law.